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JURY TRIAL.

A✓TREATISE
ON
TRIAL BY JURY,
INCLUDING QUESTIONS OF
LAW AND FACT.

WITH AN
INTRODUCTORY CHAPTER ON THE ORIGIN AND
HISTORY OF JURY TRIAL.

BY
JOHN PROFFATT, LL. B.
AUTHOR OF "CURIOSITIES AND LAW OF WILLS," ETC.

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PREFACE.

THE present treatise is an attempt to give the law applicable to all proceedings connected with the jury from its selection to its discharge.

It is the first attempt of the kind, and therefore it is hoped it will be received somewhat indulgently, since there have been no models to choose from; and therefore I had to form my own plans of procedure. There have been works written on the history and on some features of the jury system; but this is the first time in this country, as far as I am aware, that a treatise has been written, treating of the history as well as the practical details and proceedings of the jury. This is the more to be wondered at since in France, where the jury is comparatively a modern institution, there are no less than a dozen works on the subject devoted to the practice as well as the theory of the system.

I have given considerable attention to the subject of questions of law and fact, and have endeavored to give some satisfactory mode for distinguishing between them.

It is hoped that this attempt to gather within a single volume the law relating to proceedings in trial by jury may be favorably regarded by the profession, whose suggestions may hereafter enable me, I trust, to make the work more acceptable to their favor and patronage, and to supply defects which, in spite of all my care and exertion, I know must be found in a work upon a new subject.

J. P.

November 1, 1876.

CONTENTS.

CHAPTER I.

ORIGIN AND HISTORY, §§ 1-40.

PART I. PRIMITIVE MODES OF TRIAL	§§ 1-10
II. TRIAL IN ANGLO-SAXON PERIOD	§§ 11-20
III. PERIOD FROM CONQUEST TO EDWARD I.	§§ 21-30
IV. SUBSEQUENT HISTORY	§§ 31-40

CHAPTER II.

JURIES — THEIR SEVERAL KINDS, §§ 41-80.

PART I. GRAND JURY	§§ 41-61
II. CORONER'S JURY	§§ 62-68
III. SHERIFF'S JURY	§§ 69-70
IV. SPECIAL OR STRUCK JURY	§§ 71-75
V. PETIT JURY	§§ 76-80

CHAPTER III.

RIGHT TO TRIAL BY JURY, §§ 81-113.

CHAPTER IV.

SELECTION AND RETURN OF THE JURY, §§ 114-144.

CHAPTER V.

IMPANELLING AND SWEARING THE JURY, §§ 145-203.

PART I. CHALLENGING	§§ 145-148
II. CHALLENGE TO THE ARRAY	§§ 149-154
III. PEREMPTORY CHALLENGES	§§ 155-165
IV. CHALLENGE FOR CAUSE	§§ 166-198
V. SWEARING THE JURY	§§ 199-203

CHAPTER VI.

TRIAL OF THE ISSUE; AND HEREIN OF THE DUTY AND LICENSE OF COUNSEL, §§ 204-255.

PART I. APPEARING BY COUNSEL — RIGHT TO OPEN	§§ 204-222
II. EXAMINATION OF WITNESSES	§§ 223-246
III. ARGUMENT	§§ 247-255

CHAPTER VII.

QUESTIONS OF LAW AND FACT, §§ 256-305.

PART I. CONSIDERED GENERALLY	§§ 256-263
II. WHERE INTENT IS THE MAIN INGREDIENT	§§ 264-270
III. WHERE EFFECT IS MOST CONSIDERED	§§ 271-293
IV. WRITTEN INSTRUMENTS	§§ 294-306

CHAPTER VIII.

PROVINCE AND DUTY OF THE COURT, §§ 306a-357.

PART I. GENERALLY	§§ 306-310
II. INSTRUCTIONS	§§ 311-343
III. MODE OF GIVING INSTRUCTIONS	§§ 344-350
IV. DIRECTING A VERDICT	§§ 351-357

CHAPTER IX.

PROVINCE AND DUTY OF THE JURY, §§ 358-410.

PART I. IN RESPECT TO THE ISSUE	§§ 358-385
II. IN RESPECT TO THEIR GENERAL Demeanor	§§ 386-410

CHAPTER X.

THE VERDICT, §§ 411-474.

PART I. GENERAL VERDICT	§§ 413-434
II. SPECIAL VERDICT	§§ 435-442
III. SUFFICIENCY OF VERDICT	§§ 443-448
IV. SEALED VERDICT	§§ 449-451
V. RECEPTION OF VERDICT	§§ 452-468
VI. SETTING ASIDE VERDICT	§§ 469-474

CHAPTER XI.

DISCHARGE OF THE JURY, §§ 475-491.

JURY TRIAL.

CHAPTER I.

ORIGIN AND HISTORY.

PART I. PRIMITIVE MODES OF TRIAL.

- § 1. Mode of Inquiry.
- § 2. Early Administration of Law.
- § 3. Formation of Representative Assemblies.
- § 4. The Character of Early Tribunals.
- § 5. Special Tribunals instituted.
- § 6. The Dikasteries of Athens.
- § 7. Method of Trial in Roman Law.
- § 8. The Principle of Trial by Jury existed in Roman Law.
- § 9. Ancient Scandinavian Tribunals.
- § 10. These Tribunals in Principle similar to a Jury.

PART II. TRIAL IN ANGLO-SAXON PERIOD.

- ✓ § 11. Opinion as to existence of Jury Trial at this Time.
- § 12. Trial by Ordeal and Compurgation.
- § 13. The Wergild and Frithborh.
- § 14. Constitution of Anglo-Saxon Courts.
- § 15. The Saxon County Court.
- § 16. The Court of the Hundred.
- § 17. Criminal Procedure among Anglo-Saxons.
- § 18. When Compurgation was not resorted to.
- § 19. Civil Procedure among Anglo-Saxons.
- § 20. Results of the Examination.

PART III. PERIOD FROM CONQUEST TO EDWARD I.

- § 21. Effects of Conquest misapprehended.
- § 22. Nature of the Changes introduced.
- § 23. Instance of use of Jury or Twelve Sworn Men.
- § 24. The Judicium Parium of Magna Charta.
- § 25. The Grand Assize of Henry II.
- § 26. The Assize was in Reality a Jury.
- § 27. The *Jurata Patriæ*.

- § 28. The Jury in Criminal Cases.
- § 29. The Jurors were still Witnesses.
- § 30. Gradual Development of Jury Trial.

PART IV. SUBSEQUENT HISTORY.

- § 31. The Era of Edward I. important.
- § 32. Attaint.
- § 33. Grand Jury distinct from Petit Jury.
- § 34. Jurors become Judges of Evidence.
- § 35. The Jury in its Present Form.
- § 36. Trial of Sir Nicholas Throckmorton.
- § 37. The Jury in the Time of the Stuarts.
- § 38. Punishment of Jury for Verdict.
- § 39. Independence and Province of Jury enlarged.
- § 40. Relation of Jury to Civil Government.

§ 1. Mode of Inquiry. — In tracing the history of an institution that has come down through a long period of time, we should be careful to examine and regard it under two aspects. First, we should inquire as to the idea or ideas that gave it birth; and then as to the causes or influences that may have affected and modified it. We must, therefore, regard it as a development; arising at first from a germinal element, shaping itself in form and character according to various causes, adapting itself to changing conditions and exigencies in the course of time; so that, at a certain given period, it may present aspects and forms different from those of another, but in the main possessing some distinctive element to identify it with the idea that gave it birth.¹ The history of an institution will often be but imperfectly traced, if the examination be not carried out according to these principles. Especially should this method be observed in reference to an institution so venerable as the jury when its history is traced and examined. There has been much divergence of opinion, and also much uncertainty in results, because inquirers would fix upon the jury as it existed at one period, and compare it with its aspect at another; and

¹ "No institution — at all events, none which endured — was all at once established; none was all at once abolished. Every change, either in the way of abolition of old institutions, or the introduction of new, was gradual and progressive. Each alteration advanced by degrees from its first germinal element and imperfect form on its original introduction, until it had reached its final stage of development into a perfect and settled institution. Thus it was, for instance, with trial by jury, which in its present form was never established or set up, but grew by degrees from its first form into its present in the course of several centuries." Finlason, *Introd. Reeves' Eng. Law*, pp. 100, 101.

hence, an identity would fail to be recognized. Thus, we may take the jury as it is presented to us at the present time in its different aspects and character, and we may confidently assert that it did not exist in the time of the Plantagenets, much less in the Saxon period in England. But if we regard it mainly under the idea of a factor in the administration of justice to ascertain certain facts in order that a judgment of law may be pronounced upon them, we then get one central, substantial idea that may enable us to trace the institution to very remote times.

§ 2. **Early Administration of Law.**—The conception of law in early society was somewhat different from the idea we have of the term at the present time. In early society, from its peculiar constitution, there could be very little law, as we understand the term. Investigations have disclosed to us in archaic society, a general patriarchal organization in which the head or *paterfamilias* was absolute and sole ruler, who was the arbiter of all disputes and the avenger of all wrong in the domain within his sway. His decisions on all matters requiring adjudication were final—*judgments* on the matters in dispute, which were accepted as *law* in the sphere in which he acted as judge.¹ Hence in this sense a law presupposes a controversy, and the decision of the matter results in its establishment, which thereafter in a similar state of facts may form a precedent. In this way law becomes at first a body of usages, administered by a sort of arbitration, and in many forms of ancient procedure the idea of arbitration is clearly suggested.

Hence, the principal object in adjudication is to obtain a correct view of the facts; usage or the will of the judge will then give the judgment. We thus come to two essential elements of a judicial decision, the proper ascertainment of facts, and the award or decision pronounced as the result. But the former element at first becomes the more important, and the main function of a judge will be to elicit the truth in a disputed state of facts—the *verdictum*, which, when ascertained, will naturally be followed by a judgment. For this office, it will be easily seen, no special qualifications are required beyond that degree of intelligence and sense possessed by average men.

¹ Maine, *Ancient Law*, ch. 1.

And, for this reason, in early society, the tribunal that determined the fact also pronounced the judgment.

§ 3. **Formation of Representative Assemblies.** — It is obvious, as the society enlarges, either by the absorption or compulsory union of many families under one head, or their voluntary union in a sept or tribe, which according to the best authorities is the way in which societies are formed,¹ there must be a supreme representative body required to adjudicate on matters concerning members of the different groups. It is also obvious from the manner in which such a body is originated that its legislative function will not at first be called into use; for the different groups composing it have their own sets of usages, which to them are law, and administered by the head of each. Its primary use will therefore be as a sort of Council of Arbitration, for the decision of matters in controversy between members of different groups, and the vindication of personal wrongs. The idea of a public wrong — a crime — is more slowly acquired, and only subsequently developed. "If the powers of this body must be described by modern names that which lies most in the background is legislative power, that which is most distinctly conceived is judicial power. The laws obeyed are regarded as having always existed, and usages really new are confounded with the really old."²

§ 4. **The Character of Early Tribunals.** — That early popular assemblies had this judicial character is abundantly evidenced in the records of those states whose history is known to us. The Athenian Ekklesia, the Roman Comitia, and the popular assemblies of the Teutonic nations, are well-known examples. The collective body of these assemblies, in the nature of arbitration, decided judicially, and tried offenders as a court of justice. It must be apparent, from their constitution, and the numerous cases before them, that their proceedings must have been irregular, and, at times,

¹ "The most nearly universal fact which can be asserted respecting the origin of the political communities called states, is that they are formed by the coalescence of groups, the original group having been in no case smaller than the patriarchal family." Maine, *Hist. Insts.* ch. 13.

² Maine, *Hist. Insts.* ch. 13.

tumultuous. Their decisions were not given on general principles, or shaped according to any established law; these decisions were rather the result of appeals to sympathy, expediency, or clemency, and the consequence was that in addressing such bodies every means was used which was likely to influence either their favor or their prejudice. Grote, in his *History of Greece*, very aptly describes the manner of addressing such assemblies. He says:¹ "That which an accused person at Athens usually strives to produce is, an impression in the minds of the dikasts favorable to his general character and behavior: of course, he meets the particular allegation of his accuser as well as he can, but he never fails also to remind them how well he has performed his general duties as a citizen; how many times he has served in military expeditions; how many trierarchies and liturgies he has performed, and performed with splendid efficiency. In fact, the claim of an accused person to acquittal is made to rest too much on his prior services, and too little upon innocence or justifying matter as to the particular indictment."²

It is very important, in our inquiry, to attend to this general procedure in early times; for out of such general judicial assemblies have originated certain special bodies, appointed and set apart by the larger body, for the purpose of more exclusively exercising judicial functions.

§ 5. *Special Tribunals instituted.* — After a time, the large popular bodies could not conveniently or efficiently discharge the duties devolving upon them as judicial tribunals, hence it became necessary to institute smaller and more special tribunals — sections of the general body — to which were delegated judicial functions.

Indeed, so uniform is this procedure in the history of nations, in early stages of their existence, that we may safely assume it as a kind of law in the development of judicial science. In the course of this examination, we shall find many illustrations of this general principle.

¹ *Hist. Greece*, vol. 4, ch. 36, p. 299.

² In all this, how similar are the methods to those practised by the modern "jury-lawyer," who fails not to impress upon the jury every consideration of mercy, pity, or generosity.

The determination of litigated matters, at this early day, required but little of the judicial discrimination we need at the present. The principal duty and function of the judicial body was to determine *the facts in dispute*, and adjudicate upon them according to the prevailing ideas of right or justice; and therefore there was but little occasion for two separate departments in the administration of law — one to determine the fact, and another to decide and enunciate the law. It requires considerable advance in civilization and law before individual rights, and the many complicated claims arising from a settled state of property and society, are based upon exact, established, and uniform rules, so that a necessity will exist for a special order of men whose duty it is to understand and apply these rules.¹ For this reason, we find, in early judicial investigations, that the same body who determined the facts pronounced the judgment of law thereon. An examination will show how uniformly this procedure was adopted in those countries whose history is familiar to us. And from a failure to recognize this fact, many who examine the history of the jury find much uncertainty, and but imperfectly convey to us an idea of its origin and development.

§ 6. *The Dikasteries of Athens.* — Ancient history gives us no account of more eminent judicial popular tribunals than the dikasteries, as established in Athens in the time of Pericles. “The judicial power, civil as well as criminal, was transferred to numerous dikasts, or panels of jurors selected from the citizens, 6,000 of whom were annually drawn by lot, sworn, and then distributed into ten panels of 500 each; the remainder forming a supplement in case of vacancies. The magistrate, instead of deciding causes or inflicting punishment by his own authority, was constrained to impanel a jury, — that is, to submit each particular case that might call for a penalty greater than the small fine to which he was competent, to the judgment of one or other among these numerous popular

¹ “Nine tenths of the civil part of the law, practised by civil societies, are made up of the Law of Persons, of the Law of Property and of Inheritance, and of the Law of Contract. But it is plain that all these provinces must shrink within narrower boundaries the nearer we make our approaches to the infancy of social brotherhood.” Maine, *Ancient Law*, ch. 10.

dikasteries. Which of the ten he should take was determined by lot, so that no one knew beforehand what dikastery would try any particular case. The magistrate himself presided over it during the trial, and submitted to it the question at issue, together with the results of his own preliminary examination, after which came the speeches of accuser and accused, with statements of their witnesses."¹

Were it not that the dikasts were judges of law as well as matters of fact, there would be a very close similarity between them and our modern jury; but it has been shown that the distinction between law and fact was necessarily a very indefinite one; and it will be found that in early times our jurors had the same privilege, while even now it is a matter of continual discussion how far jurors may be judges of the law as well as of the fact in some cases. Indeed, the similarity is so great as to suggest to some the idea that these bodies were the models of our own jury.²

If we disconnect from our mind certain adventitious forms and features of the juries of the present time, it will not be difficult to admit a striking resemblance between the dikasteries of Athens and our juries; so close is the similarity that some writers do not hesitate to give to the dikasts the title of jurors.³ It is not to be wondered at that so many attempts

¹ Grote, *Hist. Greece*, vol. 5, ch. 46, p. 211.

² This was the opinion of Dr. Pettingall, who wrote an ingenious treatise in 1769 to show that the English jury was probably derived from the Greeks and Romans.

³ "Taking the general working of the dikasteries, we shall find that they are nothing but jury trial applied on a scale broad, systematic, unaided, and uncontrolled beyond all other historical experience; and that they, therefore, exhibit in exaggerated proportions both the excellences and the defects characteristic of the jury system as compared with decision by trained and professional judges. All the encomiums which it is customary to pronounce upon jury trial will be found predicable of the Athenian dikasteries, in a still greater degree. All the reproaches which can be addressed on good ground to the dikasteries, will apply to modern juries also, though in a less degree."

"In Athens, the dikasts judged of the law as well as of the fact. The laws were not numerous, and were couched in few, for the most part familiar, words. To determine how the facts stood, and whether, if the facts were undisputed, the law invoked was properly applicable to them, were parts of the integral question submitted to them and comprehended in their verdict." Grote, *Hist. Greece*, vol. 3, ch. 46, p. 242.

The reader cannot find a fuller description of the popular tribunals of Athens, and of the important influence they had in securing popular liberty, than in this chapter of the eminent historian of Greece.

have been made to find an original form and model for the jury, and that so many nations have been credited with its institution. The idea of trial by a section of a popular assembly is by no means so unique or so exceptional as to be considered peculiar to any people. We find such an idea prevalent in all places where there was any system of popular action or representation. In fact, so general and prevalent is a procedure like this as to justify us in assuming it to be a general law in the development of the jurisprudence of all free societies. True, the form and character of the tribunal will not everywhere be identical; it will evidently be modified to suit various conditions in the progress of a people, and in consonance with their polity and social organization. So that the germinal idea of a jury trial may be found more remote and more prevalent than is generally supposed.

§ 7. *Methods of Trial in Roman Law.*—The Roman Comitia, following the law that has been pointed out, was at first, like all representative bodies, a sort of judicial council, — which character it retained until a late period. From earliest times, it had occasionally delegated its criminal jurisdiction to a Quæstio, or Commission, which bore much the same relation to the assembly which a committee of a modern legislative body bears to the body itself; with this difference, that the Roman Commissioners or Quæstores were not obliged to report their action to the superior body, but exercised their powers without any reference or submission, even to the passing of sentence on the accused. From occasional appointments of such Committees, there afterwards were permanent ones appointed, with certain defined powers and objects in the trial and punishment of crimes.

As any system of law is developed and matured, there must necessarily be a discrimination between questions of law and fact, and the matured Roman jurisprudence made a strict discrimination in this respect with signal success. In carrying out these separate investigations, the Roman law adopted a procedure that entitled it to the admiration and approbation of succeeding ages; and gave, far more than is now perhaps acknowledged, to future systems of law both a method and a model.

The system of pleading among the Romans was intended, and had the effect, to bring the parties to an issue, without which no systematic trial could take place. When the issue was determined, it was the duty of the prætor, or magistrate, to define the points in dispute, after declaring the law or *jus* applicable thereto, and then refer the issue thus prepared to a *judex* or *judices* to be tried, and the result was a *judicium* in favor of one or the other side.¹ The *judex* so chosen was sworn to duly and truly perform his office without favor or affection, and enjoyed the privilege of associating with him other persons as assessors.² At first the *judices* were chosen, though not invariably, from the senatorial class, and were appointed by the prætor with the consent of the parties, who had, nevertheless, the right of objecting to the *judex* so proposed which was termed *rejicere* or *ejurare*.

The procedure before the *judices*, was almost identical with that of litigants before a jury at the present time. "If the prætor granted no time, called a *dilatio*, for the purpose of getting together the necessary proofs, or on other sufficient grounds, the third day, *dies perendinus* was fixed for the *judicium*, or trial; the case was then briefly opened before the *judex*, and afterwards debated at length; speeches were made on either side, after which evidence was introduced in support of or against the case. In the afternoon the sentence was pronounced *post meridiem præsentī et litem addictio*."³

§ 8. The principle of trial by jury existed in Roman law.

— That the method of trial represented to us in Roman law, embodied the principle of trial by jury, is undeniable,⁴ so far as

¹ Colquhoun, Rom. Law, § 2322.

² Speaking of the separate inquiries in Roman actions, an able writer says: "The person who exercised the one function was spoken of by the Romans as *magistratus*; the person who exercised the other, as *judex*; to the law represented, pronounced, and vindicated by the magistrate, they applied the term *jus*; to the examination of contested facts by the judge, the term *judicium*. Among the Romans, the *magistratus* was a different person from the *judex* until the introduction of the system of *extraordinaria judicia*. The two functions were kept almost entirely apart, and from a comparatively early period of Roman history the notion of a judge distinct from the magistrate was familiar to the national mind." Sandar's Introd. to Insts. p. 25.

³ Colquhoun, Rom. Law, § 2341.

⁴ In his Law of Evidence, vol. 1, p. 5, Starkie says: "The principal and characteristic circumstance in which the trial by a Roman differed from that of a

that principle is the examination of disputed facts and a judgment thereon by a separate body, approved and accepted by the litigants; but that it was selected, and composed, in the same manner, that it offered the same safeguards as our modern jury, and had the same popular character, can hardly be admitted. In estimating and comparing the character and utility of an institution as it exists in different countries, we are too apt to disregard the political and social organization and the moral character of the people among whom it exists. Just as the oak in some soils and situations will develop into a massive, sturdy, and vigorous tree, and in others will dwarf and diminish to a mere shrub; so an institution which finds a congenial place and spirit will establish itself and flourish in vigor and usefulness in some countries, while in others it will become a mere name, enervated, and finally undermined, because it finds no adequate support or development in the character of a people. Thus, while the general principle of trial by jury may be found to exist in many legal systems, it is only found in its full vigor and efficiency where there is a free popular system of government, with an active spirit of intelligence, united with a regard for individual as well as public security. It cannot exist in its full vigor under a despotism. It is essentially an accompaniment of free popular government, and there it finds its true function and full development.

It was found but a poor safeguard for personal liberty in England in the time of the Tudors or Stuarts, though it then existed in the same form and character as now; for then public spirit was too feeble, and popular action too limited and inert to resist the encroachments of arbitrary power; but in a later period, when the public idea of liberty had been awakened, and popular power strengthened and enlarged, the jury system was sufficient to protect personal rights and liberty even when assailed by judicial malevolence or royal prerogative.

modern jury, consisted in this, that in the former case, neither the prætor, nor any other officer distinct from the jury, presided over the trial to determine as to the competency of witnesses, the admissibility of evidence, and to expound the law as connecting the facts with the allegations to be proved on the record: but in order to remedy the deficiency, they resorted to this expedient: the jury generally consisted of one or more lawyers, and thus they derived that knowledge of law from their own members which was necessary to enable them to reject inadmissible evidence, and to give a correct verdict as compounded both of law and fact."

§ 9. **Ancient Scandinavian Tribunals.** — The tribunals of the people of the northern parts of Europe had, in ancient times, a popular character. This was a distinctive feature, thus corresponding to the general rule in the formation of such tribunals, already pointed out. From the larger body called together to represent a certain district, a smaller section, or committee, was appointed, as a special tribunal for the administration of law, and, in some cases, for the enactment of a law. This latter function would necessarily be assumed when an adjudication was made upon a state of facts to which the existing law, being as a rule simple and particular, could not be applied. The result was accepted as the enunciation of a new rule or law. There were many characteristics about these ancient tribunals that show a remarkable and a very close analogy to our trial by jury.¹ They were generally composed of twelve or some multiple of twelve;² they were selected from the general list of freemen of the district, who had a right to attend the general assembly; they were sworn to give a true verdict upon the facts submitted to them; and in most cases were subject to the approval of litigants.

The Norwegian *Laugrettomen* is a good example and representative of these bodies. A full account of it is given in the code or law of *Gulathing*, published by King Magnus in 1274; but the court existed long before this. The *Gulathing*, so called because it assembled in the Island of Guley, was a general representative body for the southern part of the country, composed of one hundred and thirty-nine deputies, who were summoned and selected by sworn officers. From this general body there were thirty-six selected, in what manner is not well

¹ A Danish jurist, Professor Repp, published in 1832 a learned treatise on the forensic institutions of Scandinavia, in which he does not hesitate to speak of the usual mode of trial among the people as a trial by jury.

² Twelve was not only the common number throughout Europe, but was the favorite number in every branch of the polity and jurisprudence of the Gothic nations. Spelman, *Gloss. tit. "Jurata."*

The singular unanimity in the selection of the number twelve to compose certain judicial bodies, is a remarkable fact in the history of many nations. Many have sought to account for this general custom, and some have based it on religious grounds. One of the ancient kings of Wales, Morgan of *Gla-Morgan*, to whom is accredited the adoption of the trial by jury in A. D. 725, calls it the "Apostolic Law." "For," said he, "as Christ and his twelve apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men." Forsyth, *Trial by Jury*, p. 46.

known, who formed the tribunal for trial, and administration of law. It was presided over by an officer called a Lögmann, or law-man. The following passages from the code, referred to, will show the general character of this tribunal:—

“The Thing shall last so long as the law-man chooses, and during such time as he, with the consent of the jury, deems necessary for adjudging the causes which then are to be heard. Their number is three times twelve; their nomination must be so managed that some fit men be chosen from every district. Those who are chosen to be jurors shall, before they enter the court, swear an oath after the following form:—

“I protest before God, that I will give such a vote in every cause, as well on the side of plaintiff as defendant, as I consider most just in the sight of God, according to law and my conscience, and I shall always do the same, whenever I shall be chosen as juror.”

“Those who are chosen to serve as jurors shall judge according to law, in all causes that in a lawful manner and course are hither appealed. But in all cases that the code does not decide, that is to be considered law which all the jurors agree upon. But if they disagree, the law-man prevails with those who agree with him; unless the king, with the advice of the most prudent men, shall otherwise decide.”¹

In Sweden a similar tribunal existed from time immemorial, called most frequently, in the ancient codes of that country, Nämnd, which was, as is the general rule, a sort of committee at which the general judicial business of the Thing, or general assembly, was transacted. A similar body was instituted in Denmark under the name of Nævninger, so called from a word signifying “to name,” showing plainly that they were selected as occasion required their services, and were not a permanent body. Twelve was the basis of the tribunal, though more were sometimes selected to give the parties the right of rejection. A majority was generally required in all these various bodies for a decision; but in Denmark, the bishop and the best eight men of the district had the power of confirming or rejecting their judgment.

§ 10. These tribunals were similar in principle to a jury.

¹ Forsyth, *Trial by Jury*, p. 18, quoting from Repp.

They were not clothed with exactly the same powers and functions as juries are at the present day. This would have been impossible at that time, as there was no special order of men devoted to the study of the law, to take a separate place in the administration of justice. The jury and the court were one and the same; the same body that investigated the facts and made a decision, pronounced a judgment. The law was in its simplest, rudest state, and was administered on the principle of arbitration, according to ideas of natural right and justice, or according to a simple set of rules and prohibitions in a code. And those writers who deny to these tribunals any character analogous to our jury, because they discharged both functions, the determination of the fact, and the decision of the whole question, overlook the state of early society and the character of its law. Thus, speaking of the Swedish "*nämbd*," a modern writer observes:¹—

"Still, however, I believe that the *nämbd* was the whole court, notwithstanding what Welt says as to their deciding only upon fact, and that in early times the whole judicial power, both of judge and jury, was lodged in its hands. This view is confirmed by Repp himself, who yet speaks of it always as a jury. He says that, 'in ancient courts juries were everything, and judges were functionaries of only secondary importance, and that authority and power originally vested in the juries, have, under the progressive development of monarchy, been transferred from them to the judges.' In other words, the judges were originally mere presidents of a court consisting of sworn members, who exercised full judicial powers. The latter were from time to time chosen from amongst the people, and their number was twelve; but still they were not 'jurymen' in the modern sense of the term, and altogether different from the *probi homines* of the vicinage in England, summoned for the purpose of giving the court the benefit of their testimony upon some disputed claim or question of guilt."

How could they be "jurymen in the modern sense of the term?" To suppose this to be possible, we must assume what did not, and could not exist at that time, — an artificial, organized body of law, to whose study and declaration was devoted a special body of men who should form the "court."

¹ Forsyth, Trial by Jury, p. 21.

This would manifestly require a more advanced state of society, with a complicated system of rights of person and property, and a developed system of law adapted thereto.

PART II. TRIAL IN ANGLO-SAXON PERIOD.

§ 11. Opinion as to existence of Jury Trial at this time.

—Investigators are very much divided in opinion as to the existence of trial by jury in England in Anglo-Saxon times. Some deny most positively any institution of the kind; while others find in that period the origin and form of this kind of trial.¹ Perhaps the reason opinion has been so divided here, is that many would look for the establishment of the jury in the same form and character, with the same functions as it possesses at the present time, not realizing or perceiving that it was a growth of several centuries from its first introduction in a rudimentary form, until it attained its present form and development. All we should seek to find in this early period, is some form or method of trial out of which, as a germinal element, the jury was developed to its present form and character. It is in vain to look for such a settled procedure at that early day, in that rude age, as will make a nice and distinct separation of law and fact in the administration of law; and for this reason, we find one body discharging the functions of both judge and jury.

A late writer² quotes from Stephen in his edition of Blackstone's Commentaries the following: "When the Anglo-Saxon memorials are carefully scrutinized, we find them to be such as even to justify a doubt whether trial by jury (in any sense approaching to our use of that term) did actually exist among us at any time before the Norman Conquest." This writer then

¹ The precise time at which this species of trial originated in England has been the subject of much animated discussion; and in particular the question whether it was known to the Anglo-Saxons, or was introduced by the Conqueror, has been warmly debated. Coke and Spelman, among earlier legal antiquaries, and in later times Nicholson (Preface to Wilkins' Anglo-Saxon Laws), Blackstone, and Turner maintain, with much confidence, the existence of the institution before the Conquest. On the other hand, Hickes (Dissert. Epist. p. 34), Reeves (Hist. Eng. Law, vol. 1, p. 24), and several other learned writers, contend that it was introduced by the Conqueror, or at least that it was derived from the Normans, and was not of Anglo-Saxon origin. The latter opinion is adopted by Sir Francis Palgrave, History of the English Commonwealth, vol. 1, p. 243.

² Forsyth, Trial by Jury, p. 54.

says: "This statement is, I believe, short of the truth. It may be confidently asserted that trial by jury was unknown to our Anglo-Saxon ancestors; and the idea of its existence in their legal system has arisen from a want of attention to the radical distinction between the members or judges composing a court, and a body of men apart from that court, but summoned to attend it in order to determine conclusively the facts of the case in dispute." Of course, it would be rash to assert that the trial by jury, in the sense in which we now use that term, existed among the Anglo-Saxons; no more did it in the time of the Plantagenets, or, we could say, in the time of the Tudors. We hope to show by a description of the polity, and modes of trial among the Saxons in England, that the principle of trial by jury was not unknown to the Anglo-Saxons; and that among them we shall find a system of trial, that afterwards gave the jury its popular character, its vitality, and its utility.¹

§ 12. Trial by Ordeal and Compurgation.—The Saxons, like many of the northern nations of Europe, were addicted to a spirit of divination, by which they endeavored to ascertain the will and judgment of Heaven in matters of uncertainty. For this purpose, a very common and ancient mode was the ordeal which was termed *judicium Dei*, and which after their settlement in England, was frequently adopted as a mode of trial. However, the ordeal did not supersede an investigation; a trial before a court, it was, in one sense, a means of evidence, or a means of confirming or evading a judgment. Of this, there were two kinds, the fire ordeal and the water ordeal; there was sometimes another kind termed the *Cornsaed*, which was a morsel of some kind, which being swallowed, it was prayed might choke or otherwise affect the person who took it

¹ Starkie, in his work on Evidence, p. 4, says, "Notwithstanding the difference of opinion which has prevailed among legal antiquaries as to the origin of the English jury, there seems to be great reason for supposing that it is derived from the *patria*, or body of suitors, which decided causes in the county courts of our Saxon ancestors. That the trial *per juratum patriæ* of Glanville was derived from the trial *per patriam*, as used both before and after the Conquest, is rendered highly probable, not only by the very description of the trial *per patriam* yet retained, but even still more strongly by the powers, qualifications, and duties incident to the *jurata patriæ* of Hen. II. and Hen. III."

in case he was guilty. Godwin, the powerful Earl of Kent, and father of Harold, was reported by historians to have died in the act of attempting to swallow the *Cornsaed*. Blackstone says very truly that the remembrance of it still subsists in certain emphatic phrases of assertion or denial retained among the common people, as "I will take the sacrament on it," "may this morsel be my last," and the like.¹

Fire ordeal was performed, either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight; or else by walking barefoot and blindfold over nine red-hot ploughshares, laid lengthwise at equal distances; and if the party escaped being hurt, he was adjudged innocent, but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty.

Water ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby; or by casting the person suspected into a river or pond of cold water; and if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but if he sunk he was acquitted.² Blackstone says: "It is easy to trace the traditional relics of this water ordeal, in the ignorant barbarity still practised in many countries to discover witches by casting them into a pool of water, and drowning them to prove their innocence."

The solemnity of an oath was most scrupulously regarded and implicitly believed in by the Anglo-Saxons; and from this arose the practice, so much trusted, of putting an accused person to a denial on oath. His oath when accused was, in the case of a person of known probity, that is a person "oath-worthy" as the law termed it, sufficient to clear himself. When the accusation was supported by the oaths of many, he was then required to bring forward others to support his own oath, which then rebutted the charge. These were termed compurgators, and the number required was twelve, the party accused and eleven others who swore to his credibility.³ The

¹ 4 Bl. Com. 345.

² 4 Bl. Com. 342. Reeves' Hist. Eng. Law, vol. 1, p. 35. In the Laws of Athelstan, section 7, there is a minute and curious detail of the mode of trial by ordeal.

³ 3 Coke 155 a, "He that wageth his law must have eleven others with him which think he says true."

oath taken by the accused was as follows: "By the Lord, I am guiltless both in deed and counsel of the charge of which N. accuses me."

That by the compurgators was: "By the Lord, the oath is clear and unperjured which M. has sworn."¹

In the treaty between Alfred and Guthram the practice of compurgation is brought out clearly; and the accused, to clear himself, had to get eleven freeholders to join with him in swearing.² In case of a failure to find the necessary number to join with the party as compurgators, the accused had then to submit to the ordeal; or, if he had before perjured himself. Thus, in the laws of Edward, "We have ordained concerning those men who were perjurers, if that were made evident, or an oath failed to them, or were not proved, that they should afterwards not be oath worthy, but worthy of the ordeal."³ The organization of Anglo-Saxon society in those days was such that there was ample opportunity given to neighbors to become acquainted with a man's general character, and his reputation for veracity, so that declarations of his neighbors concerning his credibility might be received with no small degree of confidence. It was on this principle "*fama publica*" a man was accused and put on his defence, and in the same way he cleared himself. This was one of the distinguishing features of Anglo-Saxon law, that an accused person should only be put upon trial by the sworn presentment of his accusers, his neighbors, which is evidently the principle out of which our grand jury originated, and is truly one of the best safeguards bequeathed to us by our Saxon forefathers.⁴

¹ Ancient Laws and Institutes, "Oaths," § 5.

² Anglo-Saxon Laws, p. 155.

³ Ancient Laws and Institutes, p. 69.

⁴ As early as the reigns of Edgar and Ethelred, mention is made of presentment by twelve sworn freemen jurors, who answered to our modern jurors, and Alfred is recorded to have hanged a judge who sentenced a man to be hanged without an indictment and presentment on oath by such jurors and sworn indictors. *Mirror of Justice*, c. 1, § 15. The laws of Ethelred begin, "that every free-man have a 'borh' or borough that they may present him to every justice, if he be accused; but if he be infamous, let him go to the ordeal." So that the ordeal was only for those who were not worthy of credit, and then only on sworn presentment. And again, the laws of Ethelred provided that in the hundred twelve thanes or freeholders were to be sworn that they would accuse no innocent man, nor conceal any guilty one, which is precisely the present oath taken by our grand jurors.

§ 13. *The Wergild and Frithborh.* — Among the Saxons there was an established graduated system of paying a certain sum for any wrong or injury done to another, from the loss of life to the loss of even a toe-nail. So turbulent and lawless were the early settlers in England, that affrays resulting in the loss of life, or serious injury to the person must have been very frequent, and the minuteness and care in which every possible loss or injury is specified, and the corresponding sum to be paid therefor, is a remarkable and peculiar feature of the early Anglo-Saxon law. The wergild is derived from “wer” signifying man, and means the worth of the man, which was laid down according to his position or degree in society. Some of these laws seem almost ludicrous in the particularity in which they enumerate every species of injury to person and property and the compensation to be made therefor. In the earliest code, that of Ethelbert (A. D. 597–616), there are full and particular provisions made for such wrongs and their payment. It is said the object of these laws and provisions was to prevent the taking of revenge upon the offender by the relatives or fellow members of the guild of the injured. And by a law of Alfred, if any man attempted private redress before he had shown his readiness to accept the wergild, he was to be severely punished.¹

One of the peculiar features of Anglo-Saxon civil polity, and one that had much to do, no doubt, with the origin of jury trial, was the system which provided that every man should be under the responsible guardianship of a certain number of his fellows. Usually these were those composing a tything. This was an admirable police arrangement, as it made these tythings, composed generally of ten families, responsible for the good behavior of one of their number. This regulation is most generally attributed to Alfred. It went by the name of *Frithborh*, properly the pledge of peace, and not *frank-pledge*, as it is commonly translated. Every one, unless he would be treated as an outlaw, was required to be enrolled in one of these divisions; the members of which would therefore have an intimate knowledge of his course of life, his acts, and general character, and would therefore be qualified either to bring him to trial, or act as compurgators to prove his innocence

¹ Laws of Alfred, 9.

Thus in the laws of Edgar (l. 6) it is laid down, "And let every man so order that he have a 'borh' and let the 'borh' then bring and hold him to every justice, and if any one then do wrong and run away, let the 'borh' bear that which he ought to bear. But if it be a thief, and if he can get hold of him within twelve months, let him deliver him up to justice, and let be rendered to him what he before had paid." And thus in the laws of Canute (l. 20),¹ "And we will that every freeman be brought into a hundred, and into a tything who wishes to be entitled to 'lad,'² or to 'wer,'³ in case any one shall slay him after he is twelve years of age, or let him not afterwards be entitled to any free rights be he 'heorth-fæst,' be he follower. And that every one be brought into a hundred and in a 'borh,' and let the 'borh' hold him and lead him to every plea." Another provision was, that the hundred which did not within a month and a day discover the slayer of a person murdered within their boundary should pay a sum of forty-six marks, of which forty went to the king, and the remaining six went to the relations of the slain, if the murderer were not found and brought to justice within a year.⁴

§ 14. *Constitution of Anglo-Saxon Courts.* — The popular courts of the Anglo-Saxons were the means of cultivating, diffusing, and maintaining a spirit of freedom, order, and self-government, and in these courts we find the characteristic element of their jurisprudence, and from them as has been shown to be the case generally with popular assemblies, there arose those special tribunals to which we must look to find the origin and idea of the jury. Whether the Saxons brought to England laws that were in any way refined, systematized, or civilizing, may be questioned; but there is no question that the infusion of a spirit of freedom and equality into our institutions gave them fresh life, and vigor, and a quality of endurance. Guizot has pointed out with force and clearness, how at the decline of the Roman empire the spirit of despotism had pre-

¹ Ancient Laws and Insts. p. 166.

² "Lad" was the right to purgation or ordeal.

³ "Wer" was the price at which every man was valued, according to his degree which, in the event of his being slain, was to be paid to his relatives, or to his guild-brethren, by the homicide or his friends.

⁴ Leg. Edw. Conf. 15.

vailed, and destroyed the energy and life of nations.¹ The eminent English historian, Sir J. Macintosh, thus points out the advantages derived from these popular assemblies: "The meetings of the people at the courts of shires, hundreds, and tythings, at which the humbler classes were necessarily more important than in the ordinary assemblies, contributed still more to cultivate the generous principles of equal law and popular government; and though trial by jury was then unknown, it cannot be doubted that the share of the people in these courts where all ordinary justice was administered, must have led the way to that most democratical of judicial institutions."²

§ 15. *The Saxon County Court.* — The court of general and superior jurisdiction was the county court, or scir-gemot which met every six months,³ and was presided over by the sheriff, and composed of all the freemen of the shire, who were termed suitors. In this court was tried all matters affecting the freeholders of the shire on the principle of arbitration, without any forms of regular justice, or the rules of a legal tribunal. From this irregular and tumultuous method of proceeding, arose a custom of referring matters for trial to a certain number of their body, usually twelve, who were selected on account of possessing some knowledge of the person on trial, or of the matter in dispute. To assure a knowledge of this kind, it was necessary that the persons so selected should come from the same hundred, or the same district where the matter in controversy was, in order that by their evidence and knowledge the question should be determined. These persons so appointed were sworn to give a true decision,⁴ and were liable to a severe

¹ Guizot, *Hist. Civiliz.* vol. 1.

² *Hist. Eng.* vol. 1, p. 81.

³ *Laws of Canute*, 18. "And thrice a year let there be a burh-gemot, and twice a shire-gemot, under penalty of the wite, as is right, unless there be need oftener. And let there be present the bishop of the shire, and the ealdorman, and there let both expound as well the law of God as the secular law."

The "ealdorman" here alluded to was the general name of an officer who presided in a court; sometimes applied to the chief of the county as well as the hundred.

⁴ In the *Mirror of Justice*, which is accepted as a work incorporating an earlier work of the age of Alfred, it is said Alfred caused several justices to be hanged for false judgment, and one of them because he judged a man to death without

penalty if they gave a false one, as they were qualified from their knowledge of the facts to ascertain the truth. From the nature of Anglo-Saxon society, and the notoriety attending every act and transaction, it was possible and practicable to find, out of the general body of freeholders assembled, a sufficient number qualified to give a decision in this manner.

In order to provide a class of persons in the county court who should be possessed of the requisite knowledge, to be qualified as witnesses, it was provided by the laws of Edgar (l. 5), that in every "burh" and in every hundred, there should be *twelve* witnesses before whom all contracts of buying and bartering were to be made, and it was also provided that no contract of which they had not knowledge should be deemed valid. Of this a writer observes,¹ "Now here it was obvious that this was in substance providing preappointed jurors for particular matters; for jurors were witnesses, and this law simply provided that they should have the requisite knowledge of the matter in hand. This, then, was the origin of trial by jury."

§ 16. The Court of the Hundred was the next court inferior to the county court. It was to be convened every four weeks,² and was a tribunal for adjudicating matters appertaining to persons belonging to the same hundred, and had a limited jurisdiction. It was declared that no man should apply to the king unless he could not get justice in the hundred.³ So it seems this was the ordinary court for those living in the hun-

the consent of all the jurors; and another, "because he hanged a man to death by twelve men who were not sworn." *Mirror of Justice*, c. 5. That, in course of time, the section of the county court who gave their evidence was sworn, is asserted by many eminent writers. Thus, Starkie, in a note to page 4 of his work on Evidence, is of opinion that the body *jurata patriæ* was a portion of the general assembly of the county, or *patriæ*. Finlason, in his edition of Reeves' History of English Law, is decidedly of opinion, and asserts it on the evidence of the *Mirror*, that it became the custom to refer causes to sworn judges, members of the county court. Reeves' Hist. Eng. Law, note *b*, vol. 1, p. 137.

¹ Finlason's ed. Reeves' Eng. Law, vol. 1, p. 23, note *b*.

² Thus, in the laws of Edward, § 11: "I will that each reeve have a gemot always once in four weeks; and so do that every man be worthy of folk-right, and that every suit have an end and a term, when it shall be brought forward." And by laws of Edgar, § 1, "First, that they meet within four weeks, and that every man do justice to another."

³ Canute, Laws, 17. "And let no one apply to the king unless he may not be entitled to any justice within his hundred."

dred, who had first to apply there before going elsewhere. The head man was called the *hundredes-ealdor*, or simply *gerefa*, which was the generic name for the officer or reeve of any district. He acted as presiding officer of the hundred. This court had a criminal as well as a limited civil jurisdiction.¹ It was out of the hundred the jurors were selected for the trial in the county court; so it happened that the jury in time were simply twelve of the hundredors sworn, and up to the time of Elizabeth it was a cause of challenge to a juror, that he was not a hundredor.

In the civil and judicial polity of the Anglo-Saxons the hundred and the court of the hundred had an important place; both as regulating the civil rights of the persons included in it, as well as in repressing disorders and crimes of all sorts. It was really the important police court of Anglo-Saxon times. In the laws of Edgar,² there are specific regulations regarding the time for its meetings, and its functions. Thus these begin: "This is the ordinance how the hundred shall be held. First, that they meet always within four weeks: and that every man do justice to another. That a thief shall be pursued. If there be present need, let it be made known to the hundred-man, and let him to the tything men, and let all go forth to where God may direct them to go: let them do justice on the thief."³

"And the man who neglects this and denies the doom of the hundred, and the same be afterwards proved against him, let him pay to the hundred xxx pence, and for the second time sixty pence, half to the hundred, half to the lord."

But the most important and suggestive regulation occurs in the laws of Ethelred, in the third part, in section 3. It is, "That a gemot be held in every wapentake (another name of the hundred); and the xii senior thanes go out, and the reeve with them, and swear on the relic that is given to them in hand that they

¹ Waters v. Walsh, Bendl. 263.

² Ancient Laws and Insts. p. 109.

³ In Anglo-Saxon law, as in most ancient law, the common and most frequent crime was theft. Thus in the law of the Twelve Tables, the principal crime is *Furtum*, and occupies the greater portion of the wrongs and remedies of that code. In the 9th year of Hen. I. it was enacted, that whoever was convicted of theft (or any other felony, 3 Co. Instit. 53) should be hanged, and the liberty of redemption was taken away. Wilk. Ang.-Saxon Laws, p. 304.

will accuse no innocent man, nor conceal any guilty one, and let them take the 'tiht-bysig'¹ men who have to do with the reeve, and let each of them give a 'wed'² of six half marks, half to the 'landrica,'³ and half to the wapentake; and let every one buy himself law with xii ores, half to the 'landrica,' half to the wapentake, and let every 'tiht-bysig' man go to the threefold ordeal, or pay fourfold."

§ 17. **Criminal Procedure among Anglo-Saxons.**—The mode of trial and conviction in criminal actions in the tribunals of the Anglo-Saxons, is a subject of much difficulty and obscurity. In the different codes of the Anglo-Saxon kings there is reference made to the ordeal and compurgation, but whether these were *means* of evidence or *modes* of trial, is considered by many doubtful. To obtain any intelligible view of the subject we must bear in mind the character of the Anglo-Saxon criminal law, which was the principal part of their law, and that with which their codes had most to do. In the first place, a crime at that time was more in the nature of a tort in our law at the present time; this indeed was, as a general rule, the case in all early societies. The injury sustained by the individual, or by his fellow-guildsmen, if his life was taken, admitted of a certain compensation.⁴ Hence, it was the in-

¹ These were those who were publicly infamous, and unworthy of credit.

² "Wed" was a pledge or security.

³ "Landrica" was the proprietor of the land, lord of the soil.

⁴ This was the earliest mode of punishment in many nations; every crime or wrong could be atoned, and compounded for by a certain fine. Thus in the laws of ancient Greece the punishment of homicide was redeemable by the payment of a sum of money to the relations of the slain. Homer, *Iliad*, I. v. 628. Among the Saxons, and in general among all the northern nations, this was the usual way of punishing crime. Tacitus, speaking of the ancient Germans, says it was customary among them to punish homicide with a certain number of sheep and oxen, out of which the relations of him that was slain received satisfaction. Germ. 21. Among the Saxons the punishment of homicide was not always nor for the most part capital; for it might be redeemed by a recompense. According to the laws of Ethelbert the compensation was usually 100 shillings; if the slayer escaped the relations were to pay half the ordinary "wergild." By the league between Alfred and Guthram, the value of a common person was 200 shillings. By the laws of Ina (l. 12) a thief was punished with death unless he redeemed his life, which was 60 shillings; but if a villein, who had been often accused, should be taken in a theft, he was to have a hand or foot cut off (l. 18). By the laws of Alfred (l. 16) whoever stole a mare with the foal, or a cow with the calf, was to pay 40 shillings, besides the price of the mare or cow. Whoever stole

jured one or his relatives who pursued the offender, as the parties in interest.

Suppose it be a case of homicide or theft, two of the crimes most common in that age. The accusation might be made under two circumstances; first, when the accused was caught in the act *in flagrante delicto*; secondly, where the accusation was made on probable cause as we should say. In the first instance, the party who prosecuted, because having an interest, would be sure to proceed; in the second instance, this would not always be the case, and the result would be that crimes might be committed by some unknown party, who might escape, as unless a party had complete proof, he would not be willing to proceed on probable cause. The system of Frithborh, in some measure supplied this defect, because the tything having a degree of responsibility for the conduct of each of its members might surely be expected to be circumspect to bring criminals to justice; this in a manner was like supplying a system of public prosecution, or rather repression of crime.¹ The next question is as to the *forum* for trial. This evidently was the court of the hundred, the great police court of the Anglo-Saxons, or when it concerned different hundreds, the county court, the court of general jurisdiction.

Now who composed this tribunal? Evidently all the freemen of the hundred had a right to be there as members, but practically it was composed of only a portion. In case of

anything out of a church was to pay the value and a fine according to the value, and also was to have the hand cut off which committed the fact (l. 6).

¹ Reeves' Hist. Eng. Law, vol. 1, p. 33, gives the following account of procedure, to which Mr. Finlason in his edition objects: "The prosecutor, or accuser as he was called, made his charge; which, it would seem, was sufficient alone to put the person accused on his defence. The defence and answer to this charge was this: If it was a matter not of great notoriety, but such as might admit of some doubt, the party *purged* himself by his oath and the oaths of certain persons (called thence *compurgators*) vouching for his credit, and declaring the belief that he had that he spoke the truth. If the compurgators agreed in a favorable declaration, this was held a complete acquittal from the accusation. But if the party had been before accused of larceny or perjury, or had any otherwise been rendered infamous, and was thought not worthy of credit, he was driven to make out his innocence by an appeal to heaven, in the trial by *ordeal*."

As to this, Finlason remarks, "No authority is cited to prove that a mere accusation was sufficient to put the accused on his defence, and it is quite contrary to the whole tenor of the later Saxon laws, and the cases recorded in the *Mirror of Justice*." But it is only in a late period we find an *accusatory* tribunal, and no doubt in the earlier period it was correct as Reeves stated.

an accused openly detected, it was a very simple matter, — either pay or suffer. But when an accused denied his guilt, there must then be a trial; and here comes the gist of the inquiry: How was this carried out? It is plain from the various laws, that when the accusation was made before the hundred court, the party accused had to swear his innocence of the charge, and find others with himself, to the number of twelve, to join with him. Was this conclusive? There seems no doubt this was the final determination of the charge; for so great was the sanctity of an oath of a reputable person in that age, that implicit confidence was placed in this mode of decision. It is to be remembered that in reality these compurgators were members of the hundred with the individual accused, who, from the circumstances of Anglo-Saxon society, had *knowledge* of themselves as to the reputation and credibility of a person living among them. If one failed to be thus cleared, exculpated by his fellows, the ordeal followed. Evidently there must have been some hearing in the hundred court, in order to ascertain a person's credibility before he was adjudged to the ordeal. Thus in one of Ina's laws (l. 54), it is said, after pointing out how a person shall clear himself, under certain charges, "If he be *found guilty*, then may he give to any one of the 'hyndens,'¹ a man and a coat of mail and a sword, in the 'wergild' if he need." This unmistakably implies an inquiry by the court of the hundred, as we might obviously infer there would be.

§ 18. When Compurgation was not resorted to. — The Saxon laws provided that in case of notoriously untrustworthy men — men who were *tiht-bysig* — no purgation would be allowed. And in other instances, as where a person was taken with the *mainour*,² as it was termed, and the accusation was supported by the oaths of a competent number of friends joining with the accuser, which oath was called *vorath* or *forath*,³

¹ "Hynden" was an association of ten men, from whom the compurgators were to be chosen in a case of a deadly feud.

² "Mainour," in a legal sense, denotes the thing that a thief taketh or stealeth. As to be taken with the *mainour* is to be taken with the thing stolen about him. Fl. Cor. fol. 179.

³ In the old Danish law it was known as the *asworeneth*, "sworn oath." See Gunderman, Enst. Der. Jury, 35.

there was no purgation permitted. The accused, as the case was now proved *primâ facie*, was given over to the ordeal, when it was believed the God of Truth, if there was any erroneous judgment, would interfere.

We now perceive the functions of the body mentioned in the law of Ethelred, which, we said, was a suggestive body, as its establishment clearly gives us the first inkling of an *accusatory jury*, in reality something like our present grand jury, but with larger authority and functions. It was remarked that for want of a public prosecuting body, many criminals might go unpunished, and in the course of time, from the facility with which a man might find friends to act as compurgators, this would be often a fallacious method of detection; and hence the highly important provision of Ethelred, "That a gemot be held in every wapentake; and the twelve senior thanes go out and the reeve with them, and swear on the relic that is given to them in hand that they will accuse no innocent man, nor conceal any guilty one." Now it is evident that an accusation in this way, by this body, was equivalent to a *judgment*.¹ Mark how solemnly it is adjured; how carefully it is to act, knowing, no doubt, the serious results of an accusation. This body then were not merely inquisitors; they were more, — they were a body of judges.² As accusers, they were obviously equivalent to a kind of public *vorath*, a body before mentioned, who swore an accusation against one, who was then delivered over to the ordeal.³

§ 19. Civil Procedure among Anglo-Saxons. — The civil

¹ This is shown by the provision of Ethelred, "And let every one (accused) buy himself law with xii ores, half to the lord, and half to the wapentake, and let every man of previous bad character go to the threefold ordeal, or pay fourfold."

² That unanimity was not required from this body, is apparent from a law of Ethelred: "And let doom stand where thanes are of one voice; if they disagree, let that stand which viii of them say. And let those who are there outvoted pay each of them six half marks."

³ This is the view of Forsyth in his work on Trial by Jury, p. 79, who says: "It makes little difference whether we consider the 'twelve senior thanes,' mentioned in the law of Ethelred, which has been previously noticed, members of a court of justice, or merely inquisitors to accuse of crime. Their functions in either case would be very nearly, if not altogether the same." And yet, in another place, the same author says our Anglo-Saxon ancestors had no knowledge of trial by jury.

procedure of the Anglo-Saxons must have been of a very simple and informal character. Their laws, as is the case with those of all early nations, were necessarily rude and imperfect as regards rights growing out of claims to property of all sorts.¹ Indeed, in that early time, there was no great need of a refined

¹ The specimen of Anglo-Saxon law which we find in the codes attributed to the different kings does not exhibit an advanced state of society. On the whole, they mainly consist of religious precepts (no doubt inserted through the influence of the bishops), and ordinances defining and punishing certain wrongs. There is almost nothing relating to rights of property by transfer, inheritance, or contract. We must not, therefore, look upon these codes as a complete embodiment of their law. Codes do not, at an early period, contain the whole law; but only a very inferior part, often; for there must be a great portion of customary law — the *lex non scripta* — which obtains all the force of law among the people. That this was the case among the Anglo-Saxon, is abundantly evidenced. At the time the Saxons came to England, they found established and naturalized there the Roman law, which had been familiar and administered there by eminent judicial officers for more than three centuries. There is no question whatever but the Roman law took firm root in Britain before the arrival of the Saxons, and that a division of the country was made, for the purposes of administration, into counties and manors. The Romans were, above all other conquering people, distinguished for the excellence of their administrative government, and the excellent adaptability of their law to different peoples and circumstances. It is preposterous to assert that this law was abolished and uprooted by the Saxons; on the contrary, it subsisted as the customary law of the people; and the Saxons engrafted on it their rude system of criminal law, which was after a time the only part that survived; for, in process of time, whatever civil law was introduced was certainly taken from the Roman law. This is more obvious and reasonable, when we consider that the clergy, and the bishops in those days, who were as a rule learned in the civil law, had a great share in the administration of justice, and subsequently in framing the law. It is remarkable that the Saxon written law nowhere points out the formation of some of those institutions found to have existed among them. For instance, no mention is made of the institution of the municipal, the manorial, nor other divisions and organizations of the country; while there is constant reference to them. The most that can be said is, that the Saxons adapted divisions already existing, suitable to their free popular mode of life, and in this way gave them their vitality and usefulness. An argument against any such institution as a jury among them, is founded on the silence of their law on this head; but in fact, if this were quite valid, we might deny there were at all among them many institutions of whose existence we never make a question. "It is obvious, then, that these successive collections were not complete codes of law — that is, of the whole of the law they had — nor even collections of their laws, in the sense of all their laws; but they were only collections of their written laws; that is to say of the *new* laws they made to alter, or regulate or enforce laws already existing or institutions already established. Each king put forth a kind of edict, or collection of edicts, on such matters as appeared to require to be altered or enforced, and thus they afford only a kind of indirect and incidental evidence of the system of law then existing, which is not embodied or codified in these laws; but, on the contrary, is only to be collected therefrom by close examination and careful induction." Finlason's ed. Reeves' Eng. Law, vol. 1, p. 40 (n.).

system of law; there was then nothing like the ramifications of modern life which bring men into numerous relations with one another through *contract*, and create a complicated and numerous class of rights and liabilities which need to be carefully defined and secured. The principal, almost the whole, of their enactments related to crimes and wrongs; these in early stages of society imperatively requiring the first attention of a legislator.

The following example of a civil suit taken from the *Historia Eliensis*¹ will show the usual mode of proceeding. A large meeting or court (*magna concio*) was held at Witlesford, in Cambridgeshire, over which Ægelwin the ealdorman presided. When all were seated, one Wensius, a relation of Wulfric, rose and laid claim to two hydes of land at Swaffham, of which he said that he and his kinsmen had been unjustly deprived, and had not been paid their value. Upon this Ægelwin, the president, asked the assembly if there was any one present who knew how Wulstan (the party in possession) had become the owner of the land. Alfric of Wicham answered, that Wulstan had bought it from Wensius, the claimant, for eight pounds, which he paid him in two sums, at two different times, and that the last of these sums was sent to him by the hands of Leofwin the son of Ædulph, who gave him the money in the presence of eight hundreds in the southern part of Cambridgeshire, where the lands in dispute lay. To prove the truth of this assertion, Alfric vouched as witnesses the inhabitants of those eight hundreds (*viii hundretas traxit in testimonium*); and the court having heard their evidence decided against the claimant.²

Here we see that the court, composed of all the freemen of the shire, was the tribunal called upon to decide the question. From the knowledge of the members present, the decision was made. These were the hundredors who had knowledge of the transaction, and as witnesses testified to it there and then. So that in reality the matter was left to a section of the popular assembly, who were possessed of information on the matter to decide, and the court adopted their decision.

§ 20. Results of the Examination. — From the examina-

¹ Vol. 1, 45.

² Forsyth, *Trial by Jury*, pp. 70, 71.

tion thus far, it can be plainly inferred that there was a system of trial among the Anglo-Saxons which brought into use the voice, the judgment, and the coöperation of the fellows or neighbors of those who appeared before their tribunals; that these tribunals, following a general rule of free communities, were popular representative assemblies composed of the freemen of the district represented in them, and presided over by an ealdorman, which was a general name for the presiding officer of any district; that in time, as happens in the history of all such bodies, a portion of the assembly had delegated to it the function of deciding judicially in matters in controversy; and their qualifications for this duty depended on their knowledge of the facts, which knowledge was easily attainable among the members, because of the peculiar social structure of Anglo-Saxon society; that as a general rule the number selected who were thus qualified was *twelve*, as appears from the continual use of and constant reference to that number in judicial proceedings. Thus, in order to secure that qualified number, it was ordained there should be twelve witnesses in every hundred, who should attest all transactions, and who should afterwards give their testimony whenever a controversy arose in the court, and act in the decision of the question. It was the custom to permit an accused person, when put on trial, if of good reputation, to clear himself by his own oath and the oaths of eleven others, who vindicated him because of *their knowledge*. And an accusatory body consisting of twelve, and solemnly sworn, was afterwards appointed to discover and convict persons guilty of crime; their *doom*, as it was called, being equivalent to a judgment.

In all this we do not find the trial by jury with exactly the same form and character as it is presented to us at the present time. That would be manifestly impossible. We do find, however, a system of trial adopted containing the very germ, and some of the features of jury trial, which, when afterwards systematized, developed, and improved under competent jurists, and moulded to meet the growing exigencies of society, and the increasing importance of law, became, after centuries, a regular and an established institution with well defined and separate functions in the administration of law. What are some of these characteristics? 1. The practice of taking from the neighborhood where the controversy arose, a certain

number of one's fellow-men to act as judges or jurors.¹ 2. The practice of allowing a man's vindication or conviction to depend on a body who were familiar with the facts, or had knowledge of the parties; and it can be no valid objection that these jurors were rather witnesses. What does it matter how the knowledge is obtained on which a judgment is formed, whether from others or from one's own consciousness? This only goes to the *mode* of acquiring the knowledge, and is altogether a matter of expediency. The essence of the qualification is *knowledge*, and the constitution of early Saxon society gave opportunities for acquiring this knowledge, which would not be practicable in modern society, and hence we take a different mode of obtaining it. And lastly, but by no means peculiar, the general pretence of selecting the number twelve to act in this capacity.²

PART III. PERIOD FROM THE CONQUEST TO EDWARD I.

§ 21. *Effects of the Conquest misapprehended.* — It is the common belief that on his accession to the throne of England, the Conqueror made a radical and complete change in the laws and institutions, and that an entirely new system was established on the ruins of the old. But this was by no means the case. While changes and innovations were certainly made, there was no sweeping abolition of laws and customs, no entire uprooting of old institutions, and no extensive interference with the ancient rights and privileges of the people. There were, no doubt, alterations; but they were such only as adapted the old established institutions to the new polity of the Normans. That it was never the intention of William to introduce a new system of laws and customs, and abolish the old,

¹ It was all the same, judges or jurors, it made no difference at that time, when there was no regular system of law, except established familiar rules, prohibitions, and customs.

² Lord Coke, referring to the custom of selecting twelve, so general, says: "So far, in this case, usage and ancient course maketh law. And it seemeth to me, that the law in this case delighteth herself in the number twelve, for there must not only be twelve jurors for the trial of matters of fact, but twelve judges of the ancient time for the trial of matters of law in the exchequer chamber. Also for matters of state there were, in ancient times, twelve counsellors of state. He that wadgeth his law must have eleven others with him, which think he says true. And that number of twelve is much respected in Holy Writ, as twelve apostles, twelve stones, twelve tribes, &c." 3 Coke, 155 a.

is evidenced by his constant endeavors to appear not so much in the light of one who acquired his rights by conquest, as in the character of one who came to the throne regularly, *de jure* as one entitled by his relationship to the Saxon line.¹ It was his constant endeavor to show to the people, that their old laws and privileges should remain intact, that their cherished institutions should still remain as before. Accordingly we find concessions publicly made assuring them of the continuance of their old laws and customs under their favorite sovereigns.

Thus, in a proclamation or great charter addressed by him in 1070 to "William, Bishop, and Godfrey Portreeve, and all the burgers in London, French and English," we find he says that his will is that they should have the laws which they possessed in the days of King Edward.

It would hardly have been policy to attempt a complete change, or to impose an entirely new system upon the people; and it is acknowledged William was a politic king, and he certainly had around him prudent counsellors.² Even had it been politic, it would not have been practicable. Where has the attempt ever succeeded in a conquering race imposing entirely their laws, their polity, and new institutions upon a people who had any degree of law and civilization among them? There may be the harshest measures used, but in the long run, customs woven into the very life and existence of a people will linger, and now and again assert themselves in one form or another. William, therefore, found a system of popular representation, founded upon local divisions. Courts in which the people were themselves concerned in administering the law were founded on these divisions, and institutions growing out of these were endeared to the people by long use and familiarity. Therefore, all was adapted, but improved, as we shall find in many ways; but the characteristic features of Anglo-Saxon jurisprudence were retained,—the system of wergild compurgation, ordeal, *frithborh* or mutual suretyship, and the necessity of witnesses to attest legal sales.

¹ Thus we find him designating himself in his charters, "*Ego Wilhelmus Rex Anglorum hereditario jure factus.*"

² In the laws which he promulgated by the name of *Legis Gulielmi Conquestoris*, there is the following preface, "*Cez sont les leis e les custumes que li reis Will grantad al pople de Engleterre apres le coquest de la terre: iceles meimes que li reis Edward, sun cousin, tint devant lui.*"

§ 22. **Nature of the Changes introduced.** — That there were changes introduced is conceded; it could not be otherwise. What were these in connection with the legal system of the Saxons? The important ones were, 1. The institution of ecclesiastical courts; 2. The duel as a means of deciding legal controversies; and 3. The appointment of justiciars to travel through the kingdom and administer justice. The spiritual power was an influence in Anglo-Saxon society; that fact is attested by the dignified position assigned to the bishops in their law, their courts, and in fact in all their transactions. The bishop sat with the earl in the county court; before him, matters appertaining to his spiritual office came; and he was consulted in making wills and testaments, and in framing laws. Now, instead of sitting with the civil magistrate, the bishop is given a separate jurisdiction; this had important consequences in the subsequent legal history of England.¹ In the Conqueror's train the ecclesiastical element was especially prominent, and afterwards, in the settlement of England, we find its influence marked in every direction, and especially in the framing and administration of the law; and it must be said, for the advantage and improvement of the law; for the bishops were learned in the civil law, and it is to this fact we are indebted for an improved jurisprudence.

The martial spirit of the Normans introduced into their legal system the combat or duel, which was a feature in our own law until early in the present century.²

¹ "The Conqueror effected another most important alteration by directing that no bishop or archdeacon, should for the future hold pleas relating to ecclesiastical matters in the county or hundred court; but that all such pleas should be determined before the bishop, wheresoever he should appoint, according to the canon and ecclesiastical laws; and he prohibited all lay persons from interfering in such matters. To this ordinance the civil jurisdiction of the ecclesiastical courts which now exist throughout the kingdom, owes its origin." Spence, *Eq. Juris*. vol. 1, p. 102.

² The species of trial by *battel* (says Blackstone) was introduced into England among other Norman customs by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil, — the first in the martial court, or court of chivalry and honor (*Co. Lit.* 261); the second in appeals of felony, and the third upon issue joined in an issue of right, the last and most solemn issue of real property, in which latter it appears to have been admitted, for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence, be unable to prove it to a jury.

The trial of *wager of battel* was only abolished by statute in 1819 (by 59 Geo. III.

The appointment of justiciars to administer justice throughout the kingdom had a most beneficial effect upon English law, giving to it method and certainty. For instead of the rough, irregular adjudication of a body of freemen assembled in the county court, where tumult and passion too often swayed the judgment, there was introduced a regular procedure by judges who were familiar with a system founded on established rules of law, and with the scientific procedure of Roman law. No new body or system of law was, however, introduced; the freemen or suitors of the county court were still privileged to decide according to their old customs and laws; but their proceedings were directed and controlled by the justiciars, and made more uniform; stricter rules of evidence were adopted, and thus a regular system of procedure was developed.

The justiciar was sent down by the king, and in the capacity of sheriff convened the county court, which was then known as the *Curia regis*.¹ Many of these justiciars were ecclesiastics, generally conversant with the Roman law; and they doubtless endeavored to introduce the regular procedure of that law. It was only in this way that harmony and homogeneity could be given to the laws of the kingdom; and hence, soon after the Norman Conquest, we find our law assuming a systematic form, as is evident from the treatise of Glanville in the reign of Henry II. It is therefore under the administration of these justiciars that we find the first clear outline of a jury trial.

c. 46). This was passed in consequence of an incident that happened in the court of King's Bench in case of *Ashford v. Thornton*, 1 B. & Ald. 405. The appellee being brought into court, and when the count was read over to him, he was called upon to plead. He said, "Not guilty; and I am ready to defend the same by my body." And thereupon taking his glove off he threw it upon the floor of the court. After argument on this by the most eminent counsel, Lord Ellenborough, C. J., delivering the opinion of the court said; "The general law of the land is in favor of the wager of battle, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices therefore may justly exist against this mode of trial, still as it is the law of the land, the court must pronounce judgment for it." Sir Samuel Shepherd, the Attorney General, immediately introduced a bill in Parliament to abolish appeals of murder and wager of battle.

¹ Foss, *Lives of the Judges*, vol. 1, pp. 264, 392, shows that chief justiciars were sometimes sheriffs, and that a sheriff often held several counties, and for several years, and sometimes if the sheriff was an able man the king made him his justiciar.

Glanville himself was for many years a justice and a sheriff, and was ultimately made chief justiciary.

These judges, having some knowledge of regular procedure, could not help being shocked with the irregular, tumultuous proceedings of the Saxon county courts, and would not fail to attempt to improve their procedure, which was speedily done by the impanelling a jury to try a matter of fact, as we find to have been the case in one remarkable instance in the reign of William I.

§ 23. **Instance of use of Jury, or Twelve Sworn Men.**—A memorable proceeding took place in the reign of the Conqueror in a proceeding to decide a conflicting claim to land claimed by the sheriff of Cambridgeshire, Pichot, on behalf of the king, in opposition to Gundulf, bishop of Rochester, who claimed it as the property of the church. On an appeal to the king, he ordered a decision by the men of the county,¹ and Otho, bishop of Bayeux, was appointed to preside over the court, the members of which were sworn.² It is said the case at first was unjustly decided in favor of the sheriff, whom the men of the county so assembled wished to conciliate. Then Otho, dissatisfied with the verdict, no doubt with the eye of a practised judge discerning the bias of the men, required them to select from their whole number *twelve*, who should be sworn, and who should confirm the previous judgment. They did confirm it, and swore that the judgment given was right and true. It was subsequently learned, from information conveyed by a monk who knew the facts of the case, that the jury had wilfully given a wrong decision; and Otho, having heard this, sent for one of the twelve who had been sworn, and questioned him, and he with much contrition confessed to perjurying himself, and another confessed in the same way. The bishop then

¹ It is remarkable how long the phrase — the county — has lingered in our system of trial by jury, showing I think, the manner in which this trial grew up out of the county court. Even at the present day in criminal proceedings, a person is said to put himself upon the country for trial, when he claims the right of trial by jury.

² We find the use of a jury at first, mostly confined to investigations concerning claims to land; for the reason that in this way the knowledge of men of the county was most available. And real estate in that time was the principal kind of property. There were of course other kinds, but to these there were not likely to be conflicting claims, because in that day transfers were made by actual delivery, and were not based on a variety of contracts by which modern transfers are made and out of which much litigation takes place.

ordered the remainder of the court, and also the twelve men who had upon oath confirmed the judgment, to meet him in London, where he summoned some principal barons of the kingdom to a court. It was thereafter adjudged that this jury had perjured themselves, and the land was restored to Bishop Gundulf. The jury, and others who could not clear themselves by the ordeal, were obliged to pay a fine to the king.¹

In this transaction we clearly see how the jury was selected, and the functions it was called upon to discharge. It was a section of the county court, sworn and required to give a verdict upon their own knowledge; and for this reason a wrong verdict, implying perjury, was punished. There is, indeed, but very little difference between this jury and one in our own day, except that the former gave their verdict from their own knowledge; and it is idle to refuse to admit for this proceeding the character of a jury trial because these decided as witnesses.² This objection merely goes to the *mode* of acquiring the knowledge, and does not necessarily take from it the character of a select sworn body called upon to decide a question of fact. Not until centuries hence were juries found qualified under the guidance of fixed and exact principles of the law of evidence, to examine facts, circumstances, and evidence on the sworn testimony of others, in order to ascertain a verdict otherwise than from their own knowledge.

§ 24. **The Judicium Parium of Magna Charta.** — The common and popular opinion has been that trial by jury has been secured with other invaluable rights and privileges in that great

¹ Hickee, Thes. Dissert. Epist. p. 33.

² There have been but few writers who questioned the proceeding above as having the character of a jury trial; and the majority of our historical writers accept this as an instance of the use of a jury in the time of the Conqueror. Sir F. Palgrave speaks of the *jury* in the above case giving their *verdict* against Gundulphus (Eng. Comm. vol. 1, p. 253). Turner, in his History of the Anglo-Saxons, vol. 1, p. 535, says: "It is not contested that the institution of a jury existed in the time of the Conqueror. The document which remains of the dispute between Gundulf the bishop of Rochester, and Pichot the sheriff, ascertains the fact." Sir James Macintosh (Hist. Eng. vol. 1, p. 275) gives it this character. Reeves (History of the Eng. Law, vol. 1, p. 137) says: "The earliest mention we find of anything like a *jury* was in the reign of William the Conqueror, in a cause upon a question of land where Gundulf, bishop of Rochester, was a party."

bulwark of liberties, *Magna Charta*. The expression which is supposed to have secured this method of trial is found in the 29th chapter of that instrument, namely, that no freeman shall be hurt in either his person or property *nisi per legale iudicium parium suorum vel per legem terræ*. Most of the great commentators and writers on English law refer to this source as the security for the privilege of trial by jury.¹ Many admit its existence and use previously, but it was by this instrument it was guaranteed and perpetuated. Others affirm that the expression here used had no reference to a trial by jury as we understand it. It is claimed that the expression *iudicium parium*, had reference to a decision by the tenants of the same lord, in a matter affecting their tenure, which was commonly tried by them as peers or equals in the lord's court, and that it had a well recognized import in this sense even before the time of *Magna Charta*.² We shall better understand the import of the term, if we consider the evil against which this famous clause was designed to give a remedy. It is said by Lingard,³ in his *History of England*, that the king, without observing any form of law, had been in the habit of going with an armed force, or sending such, on the lands or against the castles of those whom he suspected. The barons therefore stipulated for a trial in case of any loss of their property or tenure; a trial in a way that was at the time a familiar principle, namely, by their peers or equals. This was really the general application of a principle that had for a long time been acted on in the assemblies in the county courts, where the general body of freeholders were all "pares." Indeed, apart from that privilege of peerage, which applied as against the crown, every freeholder was a baron, and in early times was so called, and hence the distinction between greater barons and lesser, or knights as they were called in the age of the Charter.

While, therefore, it cannot be asserted that this clause in

¹ Such is the opinion of Blackstone. 4 Com. 349.

² By one of the laws of William I. (*Leg. Gul. Cong. 23*), if there was a dispute between a lord and his vassal respecting any agreement about holding land, the vassal was to prove his case by the testimony of his peers (*par ses pers de la tenure meimes*); and an expression like that in *Magna Charta* occurs in the *Leges Henrici Primi*, thus *unusquisque per pares suos iudicandus est et ejusdem provincie* *Leg. 21, § 7*.

³ Vol. 2, ch. 14.

Magna Charta had any distinct reference to a jury trial in the true import of the term as now understood, it did nevertheless embody a principle that underlies that trial, which had become familiar even in that day, but which had now been established and recognized as a principle in a royal charter, so that henceforth it came to be regarded not merely as a privilege and an occasional rule, but as a right guaranteed under the stipulation of a royal compact; and it was undoubtedly for this reason, on account of this broad, inestimable principle, that in future times people placed themselves with implicit assurance on the Great Charter as guaranteeing them this form of trial, whenever their liberty or their property was assailed either by the encroachments of royal prerogative, or the attacks of arbitrary power.

§ 25. *The Grand Assize of Henry II.* — This was a special body instituted in the time of Henry II. for the purpose of trying the right of a person put out of possession of land, the right to an advowson, or the civil status of a person. It is fully described by Glanville, who was a contemporary, and the earliest of our juridical writers. "The assize," says that author,¹ "is a royal benefit conferred on the nation by the prince in his clemency, by the advice of his nobles, as an expedient whereby the lives and interests of his subjects might be preserved, and their property and rights enjoyed, without being any longer obliged to submit to the doubtful chance of the duel."

When the question was decided as one fit for examination by the assize, a writ was issued to the sheriff commanding him to summon four knights of the neighborhood where the disputed property lay, who after being sworn were to choose twelve lawful knights who were most cognizant of the facts, who should say upon their oaths which party had the right to the land in question. The twelve so selected were sworn to say the truth according to their own knowledge, and if they did not possess this knowledge, others were selected in their place who were thus qualified. But if there were not twelve, others were added, until twelve competent were obtained.² This shows us how well the practice was established at this

¹ Glanville, lib. 2, c. 6.

² Glanville, lib. 2, c. 17.

time of obtaining a verdict by the concurrence of twelve men. This method of obtaining the necessary number was known as *afforcing* the jury. In the ordinance appointing this body, was also a penalty for false swearing of a very severe character. If any were proved, or confessed themselves, guilty of perjury, they were to be punished by losing their goods and chattels; they retained their freehold by the clemency of the king; but they were to be imprisoned for a year at least.¹ This severe punishment was only awarded on the principle of the jurors being really witnesses, a character they had for a long time; and hence the severe enactment against perjury by jurors, which we find in many statutes up to the time of Henry VIII.

The concurrent testimony of this body was conclusive, and there was no subsequent action on the same claim, it being a legal maxim, that *lites per magnam assisam domini Regis legitimè decise nullâ occasione rite resuscitantur imposterum*.²

§ 26. The Assize was in reality a Jury. — It was merely a special jury appointed for a particular purpose. Its very constitution, its mode of selection, its functions, and its proceedings were all familiar before to the procedure of the courts. In this instance it was *specialized*. The oath which the jurors took was similar to that on other occasions. The only difference was that a higher order of men were selected, no doubt on account of the extreme importance of the questions submitted to their investigation. And so Glanville regarded it as in fact a trial by jurors, for when he speaks of the assize he speaks of it as tried by twelve jurors.³ We have seen that at a very early period pleas concerning land were submitted to the judgment of twelve men, who belonged to the neighborhood, and who had knowledge of the respective rights of the claimants, so the procedure was one familiar at the time. A writer⁴ whom we have had occasion to refer to before, says, "Glanville calls it, indeed, an institution, and for the sake of flattery, calls it a royal institution; but there can be no manner of doubt that it was simply an ordinance or regulation of the chief justiciary: just as in the time of the Conqueror we

¹ Glanville, lib. 2, c. 19.

² Glan. lib. 2, c. 18.

³ Glan. lib. 13, c. 7.

⁴ Finlason's ed. Reeves' Eng. Law, vol. 1, p. 253, note (a).

find the king's justiciary ordering twelve men to be sworn to try a real action. That was an assize, for an assize was only trial by jury in a real action (i. e., an action to recover real property), and the truth is, the institution had grown up by degrees, and had only been regulated by Glanville, who all through speaks of the recognitors as 'jurors,' — that is, sworn triers on their own knowledge."

From the recognition of the assize as a mode of procedure, in various statutes, it is clearly seen, that it was by no means a novel proceeding. The first mention is made in the Constitutions of Clarendon (A. D. 1164), in which it was provided that a dispute between a layman and a clerk concerning property should be determined before the chief justiciary by the verdict of twelve lawful men (*recognitione duodecim legalium hominum*). Next, in the Statute of Northampton (A. D. 1176), the justices are directed, in case the heir was refused seisin of his ancestor by the lord, "to cause recognition to be made by twelve lawful men as to what seisin the deceased had on the day of his death." In one of the articles of Magna Charta,¹ it was provided, "That Common Pleas shall not follow the court of our Lord the King, but shall be assigned to any certain place. And that recognitions shall be taken in their same counties in this manner: that the king shall send two justiciaries four times in the year who with four knights of the same county, elected by the people thereof, shall hold assizes."

The liberty given to the disputants to reject some of those returned on the assize on account of bias, shows how similar the proceeding was to a jury trial. Bracton, who wrote in the middle of the thirteenth century, gives us a full account of the manner in which the trial was conducted in his time.² He shows that a person heretofore known to have given false evidence was rejected; and he was also disqualified by reason of serfdom, consanguinity, affinity, enmity, or close friendship.

§ 27. *The Jurata Patriæ.* — We have seen that in early Saxon times litigated matters concerning land were referred to the entire body of suitors, or freeholders of the county, which was known as the *patriæ*. In later time a practice, no doubt for the sake of convenience, arose, of referring such matters to

¹ Sect. 8.

² Bract. lib. 4, c. 19.

a portion of the general body having a knowledge of the facts in dispute. That this select body was sworn in the time before the Conquest is by some considered doubtful; but it is, we think, quite likely that they were from the analogy of the proceeding to that when witnesses gave their testimony. Mention is made of oaths, and forms are laid down in the Anglo-Saxon laws, and it is very probable that when persons attending the court of the county were appointed to decide, they would be sworn to declare the truth. This course we see adopted after the Conquest, and hence the body came to be called the *jurata patriæ*, whose decision was called the verdict of the county, — *comitatus*, — though really given by twelve of that body sworn *dicere veritatem*. In Glanville we find frequent mention of the *jurata*, showing that it was a well known institution subsequent to the Conquest. Like the *patriæ*, the *jurata patriæ* decided on their own knowledge, and for this purpose were selected from the *vicinage*. In time, instead of the whole of the freemen of the county assembling, which was considered a burdensome duty, only a certain number were summoned by the sheriff or the king's justiciary to act as a *jurata* or as a sworn jury to give testimony on their own knowledge. This is the body, the original form of the jury, which we find mentioned in the several treatises of Glanville, Bracton, and Fleta. With reference to it, Starkie¹ says: "That the modern jury are the same with the *jurata patriæ* of Glanville and Bracton, their name, number, and general duty, which to this day is *dicere veritatem*, sufficiently prove, although it is clear that a very great change has taken place as to the manner of exercising their important functions. Even so lately as the reign of Henry III. they exercised a kind of mixed duty, partly as witnesses, partly as judges of the effect of testimony; in the case of a disputed deed the witnesses were enrolled amongst the jury, and the trial was *per patriam et per testes*; and to so great an extent was their character then of a testimonial nature, that it was doubted whether they were capable of deciding in the case of a crime secretly committed, and where the *patria* could have no actual knowledge of the fact (Bract. f. 173). It was, however, at this period, that the capacity of juries to exercise a far wider and more important function in

¹ Evidence, pp. 8, 9, note (c)

judging of the weight of testimony and circumstantial evidence, began to be appreciated, for about this time the trial by ordeal fell into disuse; and when this superstitious invention, the ancient refuge of ignorance, had been rejected as repugnant to the more enlightened notions of the age, it happily became a matter of necessity to substitute a rational mode of injury by the aid of reason and experience for such inefficacious and unrighteous practices."

§ 28. *Jury in Criminal Cases.* — We do not find much use, if any, of the jury immediately after the Norman Conquest in criminal cases. The accused was then subject to trial by ordeal, compurgation, and by the combat. Criminals were presented for punishment by the general voice of the neighborhood, which, as would be expected, was not often just or prompt in its accusation. So long as the structure of Anglo-Saxon society continued, this mode of discovering crime might prove effectual, on account of the responsibility resting upon the neighborhood for the acts and offences of its members; but in time, after the Norman settlement, this public duty was not attended to; and especially because an accuser was then obliged to support his charge by a personal combat. This evil was then remedied; for we find it provided in the Constitutions of Clarendon, that where a party was suspected whom no one dared openly to accuse, the sheriff on the requisition of the bishop should swear twelve lawful men of the neighborhood or the vill in the presence of the bishop, and these were "to declare the truth thereof according to their conscience."¹ This was in reality a similar body to the jury appointed in the law of Ethelred, and its accusation had the same effect, — a judgment by them consigned a person to the ordeal as the decisive test of his innocence or guilt. It was not until the reign of John that we find the use of juries in criminal cases to any extent.² The clergy had never given an unqualified assent to the ordeal; they had been the means of its gradual disuse, as they deemed

¹ Const. Claren. art. 16.

² At first it seems to have been procured by the accused as a special instance of favor from the crown, a fine or some gift or consideration being paid in order to purchase the privilege of trial by jury. Several instances of this kind will be found in the notes and illustrations to Palgrave's *Comm. of England*, vol. 2, p. 186.

it an impious reference to Heaven.¹ Thus in the third year of the reign of Henry III., the justices in eyre for the northern counties were ordered not to try persons charged with crime by the judgment of fire and water.² This showed how this barbarous mode of trial was gradually going out of use, and when Bracton wrote in that reign, he makes no mention of it. It was also provided at a parliament held in the reign of Henry II., that if a person were accused of murder, robbery, arson, coining, or harboring of felons, by the oaths of twelve knights of the hundred, or in default of knights by the oaths of twelve free and lawful men, and of four men of each vill of the hundred, he was to undergo the water ordeal, and if the result was unfavorable, he was to lose a foot. Here it was expressly pointed out how an accusation should be made which should be followed by such serious consequences; for the accusatory body was really a trial jury, and its judgment in effect conclusive in some instances. Hence, to avoid false accusation, it was provided in the Great Charter of Henry III. (s. 31): "No bailiff for the future, shall put any man to his open law, nor to an oath, upon his own simple affirmation, without faithful witnesses produced for that purpose."

In the reign of Edward I., the bailiffs of each bailiwick, in order to be ready for the periodical circuits of the justices in eyre, were required to choose four knights, who again were to choose twelve of the better men (*duodecim de melioribus*) of the bailiwick and it was the duty of the latter to present all those who were suspected of having committed crimes.³ Each of them took the following oath: "Hear this, ye Justices! that I will speak the truth of that which ye shall ask of me on the part of the king, and I will do faithfully to the best of my endeavor. So help me God, and these holy Apostles." This body, in consequence of the oath which they took, was called *juratores*, and combined the functions of a grand jury with those of a petit jury to try the accused.⁴ The institution of the grand jury as a merely accusatory body for the present-

¹ Thus Reeves (*Hist. Eng. Law*, ch. 8) says, "The trial by ordeal had continued till the judgments of councils and the interference of the clergy at length prevailed against it."

² Dugd. Orig. Jur. 87.

³ Fleta, lib. 1, c. 19.

⁴ Reeves (*Hist. Eng. Law*, ch. 8, p. 481) refers to this: "Here then do we see the office of the twelve jurors chosen out of each hundred at the eyre; they

ment of criminals was at a future period. Its place and functions were only distinctly marked after the trial by ordeal had been entirely abolished.

§ 29. *The Jurors were still Witnesses.*—The original character of the jury was still preserved, and their verdict given from their own knowledge up to the time of Edward I. Hence, in case of a crime secretly committed, where there were no witnesses, there could be no trial by jury; the jury were not permitted to weigh circumstantial evidence under legal rules to investigate the fact, or the charge against the accused.

In case there were no witnesses, the accused at this time, if not taken in such a way as to preclude all doubt of his guilt, was obliged to maintain his innocence by combat with the appellant, or accuser. Even when there were witnesses, it was not a matter of course to try the issue by a jury trial; the accused had the option to elect, either to be tried "by God," or "the country." In some cases, as where the circumstances attending the crime pointed almost conclusively to the prisoner's guilt, he was not permitted to throw himself upon the country for trial; he was then compelled to clear himself by *battel*.¹

"If he made choice of the trial *per patriam*, he was not to prefer the *patria* of any hundred he liked, for that was to be determined by the judge, who might assign which twelve he pleased of those returned for each hundred. This practice was in order to guard against partiality and collusion; for, says Bracton, a man might have lived very reputably in one *patria*, and not so in another. If he had chosen the defence *per corpus*, the justices, before they suffered the duel to commence, were to examine into the circumstances of the fact, lest it might be some trifling trespass, in which the duel would not lie: a laudable caution to prevent the unnecessary hazard of life in that barbarous trial."²

In the capacity of witnesses the jury were subject to interrogation by the court as to the source and means of their knowledge, were to digest and mature the accusations of crimes founded upon report, and the notorious evidence of the fact; and then again under the direction of the justices, they were to reconsider their verdict and upon such review of the matter, they were to give their verdict finally."

¹ Reeves, Hist. Eng. Law, ch. 8, p. 476.

² Reeves, Hist. Eng. Law, ch. 8, p. 477.

edge; and whenever the justices holding the trial had good reason to believe the charge to be well-founded, and suspected that the jurors through fear, love, or malice, were inclined to conceal the truth, they might separate the jury one from the other, and make a separate examination in order to discover the truth of the matter.¹

Still we have some indication that the jurors were becoming used to receive evidence beyond their own observation. The *fama publica*, which brought an accused under their examination, required to be carefully examined, and reports from trustworthy sources entered into their calculation when they made up a judgment, so they were said to give a verdict upon what they themselves had known and heard, or seen. The transition was a gradual one, from being merely witnesses, to that of forming a judgment on the effect of testimony heard by them. This only took place when the principles of the law of evidence, under an improved jurisprudence, enabled judges to give instructions on the nature and effects of evidence.

§ 30. **Gradual Development of Jury Trial.** — From the previous examination, we can see the jury being gradually evolved and fixed as an important element in our jurisprudence; and under various influences and modifications assuming its position as an established institution. First assuming some shape and form as a judicial element in the local popular courts of the Anglo-Saxons, we find it growing into a more distinct and recognized form, in the Norman period, in tribunals presided over by learned judges appointed to proceed through the country to administer justice. Not all at once becoming established, in preference to other modes of investigations the legacies of a barbarous age, it finally became, to the exclusion of these, a certain mode of procedure as efficient in the administration of justice, and the detection of guilt, as it was safe in the protection of innocence. At first, brought into use as a matter of convenience, then granted as a concession under some rulers, it finally came to be claimed as a *right* through judicial precedent, long-continued usage, or the enactments of a royal charter. It did not all at once assume its proper sphere and functions in the administration of law, but gradually took character and

¹ Bract. 1436.

form according to the varying exigencies and conditions of society, and according to the improvement and development of law. From being an irresponsible body, proceeding too often, no doubt, by clamor and confusion, restrained by no regular rules, it was afterwards guided, directed, and controlled in its action and proceeding by learned jurists under rules of enlightened procedure which made its action safe and efficient, and secured for it popular regard and confidence.

PART IV. SUBSEQUENT HISTORY OF THE JURY.

§ 31. The Era of Edward I. is important in Legal History. — At this period we begin to meet the agency of legislation in shaping and forming our law; the important statutes passed in this reign have had a decided influence on the civil as well as the legal institutions of the country. On account of these important events, and of the reforms and changes effected in our law during this period, it is regarded by all our legal writers as one of the most remarkable periods in the history of English law. Thus Sir Matthew Hale speaks of it: "It appears," says he, "that the very scheme, mould, and model of the common law, especially in relation to the common justice between party and party, as it was highly rectified, and set in a much better light and order by this king, than his predecessors left it to him; so in a very great measure it was continued the same in all succeeding ages to this day; so that the mark or epocha we are to take for the true stating of the law of England, *What it is*, is to be considered, stated, and estimated, from what it was when this king left it."¹

So successful were his endeavors, and so permanent have been their effects, that Edward I. has obtained with posterity the distinguished title of the English Justinian.² And in the Year Books of his grandson Edward III., an eminent judge, Sir William Herle, Lord Chief Justice of the Common Pleas, described him from the bench as the wisest king that ever had reigned.³

At this time we are no longer compelled to trust to analogy, obscure passages in authors, and inferences as to the real nature, organization, and functions of an institution; we have now

¹ Hale's Hist. Com. Law, 163.

² Reeves, Hist. Eng. Law, ch. 9

³ Year Book, 5 Ed. III. 14.

the treatises of able writers such as Fleta¹ and Britton; and enactments of statutes, and in the next reign we begin to have the reported decisions of the Year Books from which we may glean the settled principles and precedents of our law.

Still the trial by jury at this time continued to be a trial by witnesses in reality; the personal knowledge of the jurors was still a qualification for their office, and it will be several reigns hence before we discover the jury in any other capacity. But the practice and procedure of jury trial were becoming settled to the exclusion of the duel, which is now resorted to only in rare cases. Fleta lays it down in his treatise, that the duel is not to be adopted, if by any possible means it could be avoided.² The trial by jury was not yet, however, an established guaranteed right. It was certainly established by precedent, long-continued usage, and acknowledged in royal enactments and charters; but there was no *security* by which it could be *claimed* as an inviolable right by the subject. Up to this time, and even now, it was regulated according to the will and pleasure of the justice administering the law, and where was there any power then to guarantee it as a right, so long as the king or his justiciary thought fit to deny it? In order to find it established and secured as an inviolable right, we must wait until the growth of the popular power necessitates the participation of the people through an organized body in the enactment and administration of law. Not until the institution of parliament was any adequate security or guarantee given, that laws and privileges, however solemnly granted or assured in royal charters, should be observed and enforced. It is for this reason that there is always an intimate relationship between trial by jury and the development of civil and popular government.³

¹ The treatise called Fleta was compiled in the reign of Edward I., and embodies the greater part of the common law as it existed then. It was, however, based on the earlier works of Glanville and Bracton. This treatise is especially valuable as giving us an exposition of some of the statutes passed in this reign; and Coke for this purpose constantly refers to it. It was supposed to have been compiled by an eminent lawyer confined in the Fleet prison.

² Fleta, 51.

³ A distinguished German writer, Dr. Mittermaier, published in 1865 a work on Trial by Jury in Europe and America, which in an admirable manner points out the close dependence of the trial by jury on the character of a people, and the state of its government. He lays it down as one great fundamental principle,

§ 32. *Attaint*.—Considering the fallibility of evidence, the dangers and liability of corruption in jurors, and the consequent miscarriage of justice in their decisions, it is easily seen how much some remedy would be required to guard against these evils, and correct such drawbacks. Such a process was *attaint*, which at first was only used to punish a wrongful and corrupt decision by a jury appointed in an assize of land, but which was afterwards extended to the decisions of juries in other cases. The theory on which this writ of *attaint* was allowed, and on which the punishment was based which it awarded, was that the jurors being witnesses were qualified to declare the truth, and a mistake or wrong decision could only be attributed to wilful perjury and corruption. It was, therefore, incumbent on those who discharged this office to make themselves acquainted with the matter in controversy by personal inspection and inquiry before the day of trial so as to be possessed of the requisite knowledge for forming a judgment.¹

Whenever a party had a right to suspect a wrong judgment, he obtained a writ summoning twenty-four jurors, who should consider the same matter as the former jury of twelve. When they were assembled the proceedings and record of the former trial were read to them; they immediately took cognizance of the subject, after being sworn, and the judge explained to them the matters in dispute; and when they declared their decision, if he thought fit he might require each to declare the grounds of his decision. If this latter jury found a different verdict from the former, the punishment of the jury first impanelled was severe; they were immediately arrested and imprisoned, their lands and chattels were forfeited to the king, and they became for the future unworthy of credit; as Bracton says, they were no longer *Othesworth*.² Still later a more severe punishment was inflicted, that their wives and children should be turned out of their houses, which were to be demolished and their trees and meadows destroyed,³ but subsequently a pecuniary penalty was inflicted instead of this terrible penalty.

that trial by jury is intimately connected with the moral, social, and political condition of a people. See a review of this work in *The Journal of Jurisprudence*, vol. 10, p. 36.

¹ Bracton, 293.

² Bracton, 292.

³ Co. Litt. 294 b.

These severe penalties had in view a very grave evil, which was the unlawful dispossession of an inheritance of land, which in that day was the principal kind of property. And it must be inferred that false judgments were not uncommon, or else these penalties would not have been so terrible.

In the reign of Edward I., the process of attainr was extended, and we then find the first legislative enactment with reference to this process, which shows how prevalent the evil of false judgments was. It is enacted by this statute (3 Edw. I. c. 38): "Forasmuch, as certain persons of this realm doubt very little to make a false oath (which they ought not to do), whereby many people are disherited and lose their right, it is provided, that the king, of his office, shall from henceforth grant attainrs, upon inquests of land, or of freehold, or of anything touching freehold when it shall seem to him necessary."¹

An attainr at first did not lie except against a jury summoned to serve on an assize respecting the wrongful disseisin of land, and hence in other cases, where jurors served, as it were by consent of the parties, no attainr would lie; and if the matter on which they had given their verdict was one of a

¹ The frequent allusion to the perjury of jurors shows that it must have been a common and serious evil, against which the severest penalties needed to be enacted. It was truly remarked by Hallam (Mid. Ages, Suppl. Notes, p. 260) that perjury was the dominant crime of the Middle Ages. It is obvious, it was of very frequent occurrence at this time and in subsequent reigns, for we find a series of statutes designed to check false swearing in the case of jurors. In the 1 Edw. III. c. 6, providing a remedy, it is said, "that great mischiefs, damage and destruction hath happened to divers persons as well of Holy Church as of other by the false oaths of jurors in writs of trespass." In 38 Edw. III. c. 12, it is provided that "if any juror in assizes sworn and other inquests be taken between the king and party, or party and party do anything take by them or other of the party plaintiff or defendant to give their verdict, and thereof be attained by process contained in the same article, . . . every of the said jurors shall pay ten times as much as he hath taken." In the 10 Hen. VI. c. 4, the remedy by attainr is still more facilitated, and this emphatic language is used: "Our lord the king by the grievous complaint of his commons, considering the mischiefs had within the realm and yet not remedied, and also the great damage and disherison that cometh by the usual perjury of jurors impanelled upon inquests, as well in the courts of our lord the king as of other the which perjury doth abound and increase daily more than was wont for the great gifts that such jurors take of the parties in pleas sued in the said courts." Again, in 15th year same reign, c. 5, it is said, "that great fearless and shameless perjury, which horribly continueth and daily increaseth in the common jurors of the said realm is most likely to tend to the greatest mischief." The evil is farther mentioned in 3 Hen. VII. c. 1; 11 Hen. VII. cc. 21, 24; 23 Hen. VIII. c. 3, which is entitled "An act against perjury and untrue verdicts."

secret nature, and known only to a few witnesses, they escaped the penalty; but if it was of an open notorious character, known to all the neighborhood (*omnes de patria*), the jurors could not help possessing information, and were then culpable if a false verdict was given.¹ The process of attain was in use so long as the jurors were selected in the character of witnesses, but fell into disuse by the introduction of new trials, the first instance of which we find in the year 1665; and the process was finally abolished by statute 6 Geo. IV. c. 50.

§ 33. *Grand as distinct from Petit Jury.*—It is not easily ascertained at what precise time a second jury, as distinct from the *accusing* jury, was appointed for the trial of criminals. The establishment of the two as distinct bodies, one to arraign, the other to try, must have been, like other developments, gradually accomplished, probably as the barbarous methods of trial by the ordeal and the duel were becoming obsolete. In the time of Bracton, in the reign of Henry III., we do not observe any trace of two separate juries corresponding to our grand and trial juries. It is most probable that at that time one jury exercised the functions now exercised by the grand and trial juries. Instead of a charge, originating in public rumor, and taken up by the presentation of the jury, being *sufficient* to establish a person's guilt, it became but a *presumptive* evidence of guilt, which should be further inquired into by an additional examination according to some rules of evidence. There was thus a *second* action of the jury; and, at first, it appears, the same body acted in both cases. Thus the seneschal of Robert Fitz Roger was presented by the jurors of a township in Northumberland for amercing the tenants illegally, and without proper trial, *nec per pares suos*. This he denied and put himself for trial upon the same jurors of the township, who acquitted him.²

In the reign of Edward I. we begin to discover a second jury for the trial of an accused. Thus from Britton,³ a writer of that time, we learn, that when a person had placed himself

¹ Bract. 290.

² Rot. It. Northum. 21 Henry III.

³ Britton is a small French tract, said to have been composed under the direction of Edward. By some it is considered as an abridgment of Bracton. However, it is regarded as a valuable compendium of our law.

upon the country for trial, and when the jurors came into court, they might be challenged; and he states it as one cause of challenge to a juror that he was one of those who *indicted* him, and there was a presumption that all who indicted him were prejudiced against him.¹

It was also said by him that a person indicted should have fifteen days for his defence, which makes it still more probable that it was a different body who was to try him from that which presented him. From a description of the mode of selection and forming the trial jury, given by this writer, we see how similar the process was in form to what it now is, and it shows further, that, except in the way in which the jurors arrived at their decision, the trial was in substance as it is at present.²

It is, however, clear that the separation of the accusing as distinct from the trying jury, existed in the reign of Edward III., as a statute of that monarch provided "that no indictor shall be put on inquests upon deliverance of the inditees of felonies or trespass if he be challenged for such cause by him who is indicted."³

It was after this easy to admit other evidence to the second jury besides that on which the party was presented in the first instance; hence we find that this jury tried the presentment as merely a *prima facie* case of guilt, and it was in this manner the way was opened for the reception of evidence. The first evidence, outside of the juror's own personal knowledge, was that obtained from written papers such as depositions, informations, and examinations taken out of court. A long time elapsed before it was thought necessary to bring evidence into court in support of the prosecution, and it was still longer before the prisoner was allowed to disprove the indictment by anything else than the oaths of the jury.⁴

§ 34. Jurors become Judges of the Effect of Evidence. — The process was a gradual one by which, from being merely witnesses, the jury came to be the recipients of testimony on oath. It illustrates what we have so often asserted, that these changes were wrought out in the way of evolution, — they

¹ Britt. 12.

² Britt. 10 b.

³ 25 Edw. III. c. 3.

⁴ Reeves, Hist. Eng. Law, ch. 11, p. 164.

were gradually introduced to conform to new conditions, new modes of procedure, and new necessities. It cannot for this reason be precisely pointed out when the jury took the character it has at present as judging of the effect of testimony. And even when they were permitted to exercise this new function, we find that they were still deemed to have a personal knowledge, besides that communicated to them on sworn testimony. This merely indicates how long the original character of an old institution will adhere to it, when it suffers no violent or sudden changes.

That the jury had this character in the time of Henry IV., is evident from a case in the Year Book of the second year of that reign, the judges there declaring "*que le jury apres ceo que ils furent jurés, ne devient veier ne porter oves que eux nul auter evidence, sinon ceo que a eux fuit livrere par le court, et per le party mis en court sur l'evidence monstre;*" that is, that after the jury are sworn, they should not take with them any other evidence than that presented to them in court.

In the time of Henry VI., with the exception of permitting the jury to take their own personal knowledge as an aid to the formation of a verdict, the jury was essentially the same in character as it is at present. In Fortescue's well-known treatise, *De Laudibus Legum Angliæ*, written in that reign, we have a description of the trial by jury, which shows how similar the process was to that at present. He minutely describes the manner of assembling the panel, the selection, the swearing and challenging of the body composing the jury. He then describes the opening of the case by the parties or the counsel, and then proceeds to say: "After which each of the parties has liberty to produce before the court all such witnesses as they please, or can get to appear on their behalf; who being charged upon their oaths shall give in evidence all that they know concerning which the parties are at issue; and if necessity so require, the witnesses may be heard and examined apart. . . . The whole of the evidence being gone through, the jurors shall confer together at their pleasure as they shall think most convenient upon the truth of the issue before them, with as much deliberation and leisure as they can well desire." ¹

¹ *De Laud. Leg. c. 26.*

That a personal knowledge of a juror was not considered a good ground of objection in the time of Charles II., is made apparent in the trial of Reading in that reign. The objection was made by the prisoner that a juror was on terms of friendship and intimacy with the prosecutor, and to this Sir Francis North replied, "And do you challenge a juryman because he is supposed to know something of the matter? For that reason the juries are called from the neighborhood, because they should not be wholly strangers to the fact."¹ It was also laid down in the case of Bushell² that the jury could make use of their own knowledge in forming a verdict; it was directed that the jury should find for the plaintiff "unless they know payment was made of their own knowledge, according to the plea." This is no longer good law; so different is the case now, that a direction like this, requiring the jury to make use of their own knowledge apart from the evidence given before them, is always good ground for a new trial.

This was the reason that it was a necessary qualification for a juror to come from the vicinity in order to possess this knowledge, and it was a good ground of challenge if there were not hundredors of the district on the jury. The statute 27 Eliz. c. 6, allowed it to be sufficient if two hundredors were on the jury, and finally by 6 Geo. IV. c. 50, the jurors are required only to be good and lawful men of the body of the county.

§ 35. The jury in its present form may be considered as having been fully established at the beginning of the Tudor period in English history, a time when the influence of royal prerogative was at the fullest height. The jury was then, however, but a feeble protection to a man's rights or liberties when assailed by arbitrary power. "The palladium of English Liberty," as it is called, afforded but a slight shield to the innocent in that time, when the royal will or wish was at all hazards and without opposition carried into effect. This proves that the jury, to be of any service in the protection of individual liberty, must have surrounding, supporting, and preserving it, free, untrammelled popular action; and its efficiency and utility can never be manifested under despotic government. We find, nevertheless, in the reign of Henry VIII., one instance where

¹ 7 State Tr. 267.

² Vaughan R. 135.

a jury had public spirit, and fearless conscientiousness sufficient to declare the innocence of an accused against the accusation of a royal charge. With reference to the overwhelming power of the monarch, and the feebleness of the popular power at that time, Hargrave thus expresses himself:¹ "In ancient times, more especially in the reign of Henry VIII., when from the devastation made in the civil wars, amongst the ancient nobility, and other causes disturbing the balance of the Constitution, the influence of the crown was become exorbitant, and seems to have been at its zenith, to be accused of a crime against the state and to be convicted were almost the same thing. The one was usually so certain a consequence as the other that exclusively of Lord Dacres' case in the reign of Henry VIII., and that of Sir Nicholas Throckmorton in his daughter Mary's, the examples to the contrary are very rare." The case of Lord Dacres here referred to was an accusation of high treason preferred on the 9th July, 1535. It will be of interest to give the account as given in an extract from Hall's Henry VIII., as reported in Howell's State Trials.²

"The sayd lorde Dacres beyng brought to the barre with the axe of the Tower before him, after his inditement red, not only improved the sayd inditement, and answered every part and matter herin contained, but also so manly, wittily, and directly confuted his accusers, whiche there were ready to avouche their accusacions, that to their great shames, and to his great honor, he was found that day by his peres not giltye, whiche undoubtedly the commons excedyngly joyed and rejoysed of, insomuche as there was in the hall at those woordes, 'Not giltye,' the greatest shoute and crye of joy that the like no man livyng may remembre that ever he heard."

§ 36. Trial of Sir Nicholas Throckmorton. — This trial, in the reign of Mary, affords us an interesting and instructive view of criminal trials, and of the action of a jury at that day. It is reported in Howell's State Trials,³ and deserves a careful perusal by all who would study the history of jury trial in these times. Throckmorton was arraigned for high treason before commissioners appointed to try him at Guildhall. He was specially charged with conspiring and imagining the death of

¹ 1 Howell's State Tr. 407.

² Ibid.

³ Vol. 1, p. 870.

the queen, and intending to depose and deprive her of her royal estate, and also traitorously devising to take violently the Tower of London.

On the trial, the commissioners and the counsel for the prosecution used every art to obtain from him some admission of the evidence read against him by those who might have been called into court to give evidence according to our rules of proceeding; and when an interrogatory containing a certain charge was repeated to him, if he in his candor admitted any portion, it was then insinuated to the jury, that he did not deny the charge. In this way by distorting, suggesting, criminating, and catechizing, somewhat as in the case of a modern French criminal trial, it was sought to impress the jury with his guilt. Then at last, Sir Thomas Bromley, Lord Chief Justice of England, said to him: "How say you, will you confess the matter, *and it will be best for you.*" To which he replied, "No, I will never accuse myself; but inasmuch as I am come hither to be tried, I pray you let me have the law favorably." When the accused asked to have read from the books the law as to two witnesses required for a conviction, Chief Justice Bromley answered: "No! for there shall be no books brought at your desire; we know the law sufficiently without book." Hare, Master of the Rolls, answered him, too: "You know not what belongeth to your case, and therefore we must teach you; it appertaineth not to us to provide books for you, neither sit we here to be taught of you: you should have taken better heed to the law before you had come hither."

Throckmorton then proceeded to give the meaning of the law from his own recollection, and claimed a certain construction of it according to precedent, to which the commissioners and counsel objected; and in this way for some time a discussion was kept up. Finally, getting impatient, Bromley said, "Throckmorton, you confessed you talked with Wyatt and others against the coming of the Spaniards, and of taking the Tower of London; whereupon Wyatt levied a force of men against the Spaniards he said, and so you say all, but indeed it was against the queen, which he confessed at length, therefore Wyatt's acts do prove you counsellor and procurer, howsoever you would avoid the matter." Throckmorton replied: 'Methink you would conclude me with a misshapen argument

in logic, and you will give me leave I will make another." One of the crown counsel replied, "The judges sit not here to make disputations, but to declare the law."

Throckmorton was permitted then to address the jury, which he did in an affecting and impressive manner, beginning thus: "The weight and gravity of my cause have greatly occasioned me to trouble you here long, and therefore I mind not to entertain you here with any prolixoration: you perceive, notwithstanding, this day great contention betwixt the judges and the queen's learned counsel on the one party, and me the poor and woful prisoner on the other party. The trial of our whole controversy, the trial of my innocency, the trial of my life, lands, and goods, and the destruction of my posterity forever, doth rest in your good judgments."

When the jury were retiring both parties requested precautions against any one approaching them until their verdict was given. On the assembling of the jury to render their verdict Throckmorton was asked to hold up his hand; and the jury were told to look upon the prisoner. When asked for their verdict, the foreman, Whetston, answered Not guilty, and Bromley, astonished, asked: "How say you the rest of you, is Whetston's verdict all your verdicts?" They all answered, "Yes." Then Bromley addressed them: "Remember yourselves better: have you considered substantially the whole evidence in sort as it was declared and recited? the matter doth touch the queen's highness, and yourselves also, take good heed what you do." It was answered that they found him not guilty agreeable to all their consciences. Throckmorton then asked for his discharge, saying: "I humbly beseech you to give me such benefit, acquittal, and judgment as the law in this case doth appoint." He was, however, sent back to the Tower until he paid costs, and answered for some other matters.

The jury fared badly for this conscientious verdict. The attorney general moved the court with reference to them: "I pray you for the queen, that they and every of them may be bound in a recognizance of £500 apiece to answer to such matters as they shall be charged with in the queen's behalf, whensoever they shall be charged or called." To this Whetston replied: "I pray on, my lords, be good unto us, let us

not be molested for discharging our consciences truly? We be poor merchant-men, and have great charge upon our hands, and our livings do depend upon our travails; therefore it may please you to appoint us a certain day for our appearance, because perhaps else some of us may be in foreign parts about our business." The court, being dissatisfied with the verdict, committed the jury to prison. Four of the number were soon after discharged on humbly admitting that they had done wrong; but the remaining eight were brought before the Star Chamber and severely dealt with. Three were adjudged to pay £2,000 each, and the rest £200 each.

§ 37. The jury in the time of the Stuarts were dealt with quite as arbitrarily by the crown and its appointed judges. A flagrant instance of this was in the case of the trial of Penn and Mead¹ at the Old Bailey in 1670, for having tumultuously assembled and congregated themselves together in Gracechurch Street in London. After several times commanding the jury to retire to reconsider their verdict, they nevertheless decidedly held the prisoners *not guilty*, and the recorder addressed them thus: "I am sorry, gentlemen, you have followed your own judgments and opinions rather than the good and wholesome advice that was given you. God keep my life out of your hands, but for this the court finds you 40 marks a man, and imprisonment till paid." But the jury were afterwards discharged upon *habeas corpus* by the Common Pleas, as their commitment was declared illegal.

The trial and acquittal of the Seven Bishops² in 1688, is another remarkable and renowned instance of the courage of a jury in resisting the arbitrary will of power and authority, and shows us that the popular voice was not yet so completely awed or silenced as to be insensible to attacks on liberty and right. The bishops were indicted for a conspiracy; the alleged overt act was the composition and publication of a seditious libel under the form of a petition to the king. A most full and graphic account of this celebrated trial is found in Macaulay's History of England,³ and will ever prove a thrilling narrative in constitutional history. After the case had been summed up, and the opinions of the several judges given upon the point

¹ 6 State Tr. 951.

² 12 State Tr. 183.

³ Ch. 8.

of law as to whether the petition in question was a libel or not, the chief justice said to the jury, "Gentlemen of the jury, have you a mind to drink before you go?" to which they answered, "Yes, my lord, if you please." Upon this wine was sent for, and the jury, having refreshed themselves, retired to consider their verdict. Next morning they came into court with a verdict of "*not guilty*," to the great exultation of the people. Even the soldiers took up the acclamation, and the king became startled.¹ Of this Macaulay well remarks, "The prosecution of the bishops is an event which stands by itself in our history. It was the first and last occasion on which two feelings of tremendous potency, two feelings which have generally been opposed to each other, and either of which when strongly excited has sufficed to convulse the state, were united in perfect harmony. Those feelings were the love of the church and love of freedom."

Such courage and conscientious discharge of duty in jurors, unfortunately, were not as a rule exhibited at that time. We may be certain that the severe and summary punishment of a jury for venturing to bring in a verdict against the wishes of the crown, would soon intimidate many who were unwilling to be made martyrs to duty and conscience, and who were less able to bear the effects of judicial or royal displeasure. Hence we find a jury before the terrible Jeffreys awed and cowered into giving a verdict against the unfortunate Mrs. Alice Lisle, even when they at first returned her not guilty.²

§ 38. Punishment of Jury for giving a Verdict. — We

¹ We find in the *Life of Sancroft* by D'Oyly (vol. 1, pp. 306, 307) a singular allusion to a custom of paying jurors by a party in whose favor they rendered their verdict. This was a letter written to Sancroft by his attorney, in which he says, "In case a verdict pass for us (which God grant in his own best time) the present consideration will be, how the jury shall be treated. The course is usually each man so many guineas, and a common dinner for them all. The quantum is at your Grace's and my Lord's direction. But it seems to my poor understanding that the dinner might be spared lest our watchful enemies interpret our entertainment of the jury for a public exultation and a seditious meeting; and so it may be ordered thus: Each man a guinea over for his own desire, and guineas for his trouble, with my Lord's order that I or some other entreat them in your names not to dine together for the reasons aforesaid. There were 22 of the jury appeared and no more, and they that did not serve will expect a reward as well as those who did!"

² 1. State Tr. 298.

have shown in a former section how jurors were punished by way of attain for giving a false verdict. The punishment proceeded on the ground that the jurors had perjured themselves, being then considered as witnesses. The proceeding by attain was only applicable to verdicts in civil cases. The common law had provided no such remedy in criminal cases from the obvious difficulty of delaying the execution of criminal justice pending any procedure by way of appeal; but in the reign of Henry VII., and subsequent reigns, a remedy was sought to correct verdicts in criminal cases by means of the arbitrary jurisdiction of the Star Chamber. In the time of the Tudors especially, this jurisdiction was extended so that it defied either ancient charters or parliamentary power, and hence a right was claimed to punish jurors presumably for a false verdict as being perjured, but in reality for not complying with the wishes or directions of the court to bring in a verdict satisfactory to the royal will. Macintosh, in speaking of the jurisdiction of the Star Chamber over juries, says that in effect, this jurisdiction subjected the laws to its will. "When they animadverted on a verdict they had an opportunity of re-trying the cause in which it was given, and thus of taking cognizance of almost all misdemeanors, especially those of a political nature."¹

Hence, in the exercise of this arbitrary jurisdiction, juries were summoned before the Star Chamber and fined for verdicts of acquittal in criminal cases. Sir Thomas Smith says that he had known in Elizabeth's time a jury not only imprisoned but heavily fined for pronouncing one guilty of treason contrary to the evidence, and another jury for acquitting were fined and "put to open ignominie and shame." He adds that "those doings were even then of many accounted very violent, tyrannical, and contrary to the liberty and custom of the realm of England."²

In the reign of James I. it was held by the lord chancellor, the two justices, and the chief baron, that when an indicted party is found guilty, the jury shall not be questioned; but when a jury acquitted a felon or traitor against manifest proof, they may be charged before the Star Chamber "for their partiality in finding a manifest offender not guilty."³ This

¹ Hist. Eng. vol. 2, p. 99. ² Commonw. of Eng. vol. 3, c. 1. ³ 12 Coke R. 23.

doctrine was extended to the case of fining a grand jury when they ignored a bill; and an instance of it occurred in 1667, when Chief Justice Kelying fined a grand jury of the county of Somerset for refusing to find a true bill of murder against a man; but "*because they were gentlemen of repute in the county the court spared the fine.*"¹ This case, and several others in which the same judge was concerned, were brought before the House of Commons, and the conduct of the chief justice was condemned, when the house declared "that the precedents and practice of fining or imprisoning jurors for verdicts is illegal."

When the jury that acquitted Penn and Mead were imprisoned, one of them was brought before the court on *habeas corpus*, and it was decided that there was no power in courts of common law to imprison jurors. Chief Justice Vaughan said, "that the court could not fine a jury at the common law where attaint did not lie (for where it did, it is agreed they could not), I think to be the clearest position that I ever considered, either for authority or reason of law."²

§ 39. Independence and Province of Jury enlarged.—

With the downfall of the Stuarts, and an increasing popular power, came the abolition of the Star Chamber, when the pernicious doctrine that jurors could be held responsible for their conscientious action, according to the evidence produced before them, was no longer enforced. So long as such a doctrine was held, and could be enforced by royal authority, there could be very little safeguard in a trial by jury, or very little independence in their judgment.

Notwithstanding the condemnation and repudiation of this doctrine, there were still a power and an authority claimed to direct them in forming a verdict by the courts, in such a manner, and upon whatever issue that should be submitted to them conformable to the judgment of the court. It was claimed that in certain cases they should only find a verdict upon such facts as the judge thought fit to submit to them. Such is the tenacity with which authority clings to privilege that this doctrine was held by eminent judges for a long time, until certain public events arose which drew attention to the dan-

¹ 2 Keble, 180.

² Bushell's case, Vaugh. 135.

gerous power this doctrine gave over the freedom and lives of the people. The crisis came in connection with the expression of opinion by publication, which was now beginning to assume large importance in directing and shaping popular action. It could hardly be expected that such freedom would not in some way receive a check and restraint from royal power; and it was in the assertion of this very doctrine that means were sought to restrain such a dangerous weapon in the hands of the people. Hence prosecutions for libel were resorted to, in which at first the judges maintained the right to dictate how, and on what facts, the jury should bring in a verdict. To this assumption of authority, public attention was called in 1770 in case of Woodfall, the printer of the *Morning Advertiser*, prosecuted for an alleged libel. The doctrine laid down by Lord Mansfield in that case was so repugnant to all free speech, that it was afterwards denounced in Parliament. He instructed the jury they were merely to find the fact of publication, and when they brought in a verdict, "Guilty of the printing and publication *only*," the court rejected it and ordered a new trial.¹

Against this doctrine a determined struggle ensued, in which Erskine distinguished himself in his vindication of the rights and powers of the jury, and the liberty of free speech, by eloquence and argument that were never equalled in English law. The public struggled, until a statute was passed by the legislature in 1792, called Fox's Libel Act, which enlarged the province of the jury in prosecutions of this nature, and put an end to the arbitrary and pernicious doctrine insisted on by Mansfield. "By this bill," says Lord Russell,² "juries were constituted judges of the law as well as of the fact; that is to say, they were entitled to decide not only whether the writing in question had been published or no, but also whether it were libellous." This suggested to us the insertion in nearly all our state Constitutions of a clause giving this power to the jury.

§ 40. *Relation of the Jury to Civil Government.* — We may at the close of this historical review, aided by the preceding inquiry, point out how the character and functions of the jury depend upon the social and moral condition of a people,

¹ 20 State. Tr. 895.

² *Ess. on Eng. Gov.* p. 391.

and the nature of their political organization. We have seen that the leading characteristic of the jury was that it was *of* the people and *for* the people ; that it was essentially a popular institution through which people were habituated to share in the administration of the law, and in the maintenance of property and personal rights. This is the reason it has flourished in all free communities, and endeared itself to popular regard, so that whenever one is in jeopardy either in his person or property, we see an implicit reliance on the protection and vindication of a jury.

It depended, further, on local divisions which possessed the privilege within themselves of regulating and administering their affairs, and repressing and punishing crime among them ; therefore it is not adapted to a highly centralized government directing and controlling the actions and affairs in the minutest detail of all the people. Hence we find it languishing, inefficient, and even dangerous, where its formation, operation, and duties are under the control of a central absolute power. This was the case under the Tudor sovereigns, when there was no adequate check to restrict the power of the sovereign will, and no popular body powerful enough to insist upon the protection and guarantee of individual rights. The jury was then but a feeble safeguard, its power worthless almost, and its duty a mere name. But as soon as the people became strong enough to be represented in the government, as soon as they participated in that government through one of its powers, the jury was found vigorous, and efficient to protect liberty and property from the attacks of power and prerogative. Thus it is that the jury system is dependent for its worth and character on the free state of the people among whom it is established.

It no less depends upon their moral character. If a people are so indifferent to veracity, justice, and fair dealing as to be heedless of the consequences of a false verdict, or the crime of perjury, what use will there be in relying upon their conscience and integrity ? A stream is not purer than its source ; and a body of men selected out of a community must be fairly presumed to represent the moral character and integrity of that community. Hence, in the Middle Ages in England there were fearful perjury and many false verdicts among juries ; an oath then had not the same sanctity as when the public conscience

was more enlightened ; and it followed that the greatest evils arose from such perjury. So great were these evils, and so common the offence, that a long series of statutes was passed, with the severest penalties to check them.

Therefore, however, we may notice the shortcomings and delinquencies of juries, which unfortunately are too often apparent, we should not so much condemn their action as lament the unhealthy and depraved character of a community from which they are taken, and which, on the whole, they fairly represent. Whenever we find an accusation against the one, we condemn the other ; whenever we strive to purify the one, we should seek to improve the other, and whenever we conclude the one a failure, we abandon our faith in the other.

CHAPTER II.

JURIES: THEIR SEVERAL KINDS.

I. GRAND JURY.

- § 41. Origin.
- § 42. Functions of Grand Jury.
- § 43. Provisions for in United States.
- § 44. Qualifications.
- § 45. Selection and Organization.
- § 46. Mistakes in summoning.
- § 47. Challenge to Jury.
- § 48. Swearing Grand Jury.
- § 49. Obligation of Secrecy.
- § 50. Charge to Grand Jury.
- § 51. Powers and Duties.
- § 52. Personal Influence on Grand Jury.
- § 53. Duty as to finding Indictment.
- § 54. Powers limited to the County.
- § 55. Witnesses before Grand Jury.
- § 56. Power of Court over Finding.
- § 57. Right of Officers to be present.
- § 58. Signature of Foreman to Indictment.
- § 59. Return of Indictment into Court.
- § 60. Amendment of Indictment.
- § 61. Discharge of Grand Jury.

II. CORONER'S JURY.

- § 62. Its History.
- § 63. Number required.
- § 64. Nature of Inquest.
- § 65. Duty of Coroner.
- § 66. Power of Coroner.
- § 67. Witnesses before Coroner's Jury.
- § 68. Effect of Inquest.

III. SHERIFF'S JURY.

- § 69. When allowed.
- § 70. How constituted.

IV. SPECIAL OR STRUCK JURY.

- § 71. Its History.
- § 72. When ordered.

- § 73. Selection and Formation.
- § 74. Mistakes or Omissions of Names.
- § 75. Right of Challenge to a Special Jury.

V. PETIT JURY.

- § 76. Meaning of Term in Law
- § 77. Unanimity of the Jury.
- § 78. Reasonableness of the Requirement.
- § 79. Reasons against it.
- § 80. Jury must come from the Vicinage.

§ 41. *Grand Jury. — Origin.* — In the present chapter we shall consider the several kinds of juries, and first of the *Grand Jury*.

We have shown in the previous chapter the functions which the grand jury was called to discharge at first, and how it performed what is now the duty of a trial jury; and how in time it came to be confined to the functions of an accusing body, which is the character it now bears in the administration of law.

The name *grand jury* was used in its origin, not as now to distinguish the jury which accused from that which tried; but to distinguish the jury summoned from the whole county from that summoned from the hundred only. The following account is given by Reeves¹ of the change from this inquest of the hundred to the inquest of the county, the present grand jury: "In the time of Bracton the presentment of offences was by a jury of twelve returned for every hundred in the county. But that practice had now received some small alteration, for towards the close of the reign of Edward III., we find at a commission of oyer and terminer, that besides the return of an inquest for every hundred by the bailiff, the sheriff likewise returned a panel of knights, which says the book are *le graunde inquest*. The inquests for the hundreds still made their presentments as in Bracton's time; and if they presented they likewise found indictments; but these were confined to their different hundreds. The grand inquest probably was to inquire at large for every hundred in the county, and the hundredors became jurors in inquests *de bono et malo* or *ex officio* when called upon; and if a commission of assize and *nisi prius* was sitting, they filled the place of jurors occasionally in as-

¹ Vol. 3, p. 133.

sizes, and juries in civil cases. When the practice began of returning a grand inquest for the whole body of the county, the business of the hundred inquest must naturally decline, till at length the whole burden of presenting and finding indictments devolved upon the grand inquest, and the hundredors continued merely to be summoned for trying issues."

§ 42. Functions of Grand Jury. — By many, the uses and functions of the grand jury are extolled as the finest features of our administration of justice. Sir William Blackstone, as do many of our modern law writers, lauds it as the soul of English liberty.¹ Bentham,² and other writers, condemn the grand jury as deforming English judicial proceedings, whose publicity is their honest boast.

The opinions of those who condemn the institution are founded on the instances of the abuse of its powers and functions, which have been at many periods unfortunately, influenced by private malice or prejudice. And at a very early period this abuse was recognized, and a remedy sought. Thus, to prevent persons being put on their trial owing to false and malicious accusations to gratify private revenge, it was enacted in the reign of Edward III., that "no man be put to answer without presentment before justices or matter of record, or by due process or writ original according to the old law of the land."

But if sometimes the powers of the grand jury have been wrongly used, they have more frequently been a shield to those unjustly accused either by private malevolence or political intrigue. If the real theory of its powers and functions be carried out fully, no person can be publicly put on his trial for an infamous crime without first ascertaining if there be a *prima facie* case against him — such a degree of evidence as to his guilt as, unexplained, will be sufficient for a conviction. It is on account of this safeguard the institution is specially dear, and has been so strenuously upheld in English communities.³

¹ 3 Com. 23.

² Rationale of Judicial Evidence, vol. 2, p. 314.

³ The shield afforded by the grand jury as a protection against unjust accusations is well illustrated in a historical case in connection with the accusation against the Earl of Shaftesbury. If in 1681 the grand jury of the city of London had not resolutely refused to bring in a true bill against that noble-

§ 43. Provisions for in United States.— The supreme regard in which the functions of the grand jury have been held in this country is very markedly exhibited in our constitutional history. Instances were too familiar where secret arrests, followed by imprisonment, were made either from private malice or political obnoxiousness; but whenever this was done it was in flagrant violation of the provisions of Magna Charta, which expressly intended to check such an abuse.¹ So impatient and jealous were the people in their efforts to secure the right to an examination by a grand jury before an accused was publicly placed on trial, that the Constitution was in danger until, by the fifth amendment, their fears were quieted; and then it was provided that “no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,” with the usual exemption of maritime and military cases; and this provision is, in almost similar terms, reiterated in our various state Constitutions.² The substance and effect of such provisions are

man, he would have expiated with his life on the scaffold the venial crime of factious opposition to the court. On a mere pretence, a charge of high treason was brought against him, and he was arrested, and a bill went before the grand jury. The intention was to remove it when found, as the Parliament was not sitting, to the Court of the High Steward, where he would have been tried by peers selected for the purpose of securing his conviction. The counsel for the crown applied to have the witnesses examined in open court before the grand jury, with the view of awing that body. The foreman reminded the court of the oath of secrecy the jury had taken; but the judges declared this oath being for the protection of the king's interests, he could dispense with the secrecy. The witnesses were accordingly examined in open court, and the grand jury retired, and soon after returned with the word *Ignoramus* written on the back of the bill, upon which we are told that “there was a most wonderful shout, that one could have thought the hall had cracked.” 3 State Tr. 417.

¹ The continental jurists have lamented the want of a tribunal corresponding to our grand jury; and one of the ablest of the French jurists has particularly deplored the want of such a body in France. M. Béranger, the author of some valuable treatises on criminal law and procedure, says (*Du Jury en France*, p. 68) that a *jury d'accusation* would bestow inestimable advantages; the chief of which would be the abolition of secret investigations which are the disgrace of legislation in France. The witnesses would go before a jury instead of giving their evidence in the private room of a *juge d'instruction*. The proceedings would be oral and their length curtailed, and the accused would be relieved from a voluminous mass of documents artfully prepared to make out a case of guilt.

² The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury,

thus stated by Kent: "No person, except on impeachment, and in cases arising in the military and naval service, shall be held to answer for a capital or otherwise infamous crime, or for any offence above the common law degree of petit larceny, unless he shall have been previously charged on the presentment or indictment of a grand jury."¹

§ 44. *Qualifications.* — On account of the responsible and weighty duties devolving upon a grand jury, it has always been the practice to exercise a greater discrimination in its selection than in the case of the petit jury. From an early time, a certain property qualification was necessary to entitle a person to serve as a grand juror. Thus Hale lays it down: "I do not find anything determined, but freeholders they ought to be. The statute of 2 Hen. V. c. 3, that requires jurors that pass upon a man's life to have 40*s.* per annum freehold, hath been the measure by which the freehold of grand jury men hath been measured in precepts of summons of sessions."² It was held, however, that grand jurors are not positively required to be freeholders;³ but they are usually gentlemen of some prominence in the county. In England, by 6 Geo. IV. c. 50, grand jurors must possess the same qualifications as is required in all cases of petit jurors by that statute.

In some of our States a property qualification is required for

in case of high offences, is justly regarded as one of the securities of the innocent, against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty. *Jones v. Robbins*, 8 Gray, 344.

¹ 2 Com. 12. In the United States courts, the district attorney can by information prosecute a misdemeanor. *United States v. Waller*, 1 Sawyer, 701.

In New Hampshire, the attorney general may *ex officio* and in his discretion file an information in all cases of offences and misdemeanor not capital or infamous; *State v. Dover*, 9 N. H. 468; and this seems to be the law in Maine and Massachusetts. 5 Greenl. 254; 5 Mass. 259. The Constitution of New York does not require an indictment in all criminal cases, for it excepts petit larceny, nor of other offences not infamous, as in the cases of vagrants, disorderly persons, &c. *Duffy v. People*, 6 Hill, 75. In Ohio, it is held that the legislature may direct the mode of redress, untrammelled by the constitutional provision of indictment or presentment, as to offences criminal or infamous, when the offences are but *quasi-criminal*, as Sabbath-breaking, selling spirituous liquors contrary to law, and many other misdemeanors which may be given to the jurisdiction of justices of the peace, mayors, &c. *Markle v. Akron*, 14 Ohio, 589.

² 2 Hale P. C. 155.

³ 1 Russ. & R. 177.

grand jurors. In general, one who is a freeholder or householder is competent.¹

Besides a property qualification; it is required that they be men of credit and good standing. They must be lawful liege subjects, — according to Hale,² — not under attainder for any treason or felony, nor attainted for a criminal or civil matter, and if one be outlawed the indictment is void, though twenty others be on the inquest.³

And as to age, it is in some places held that one is incompetent above sixty years of age. Thus, under a statute which provides that persons "under sixty years of age shall be liable to serve and are hereby made competent jurors;" a person over sixty years of age was declared incompetent.⁴ If an indictment be found by a grand jury not composed in the whole of those having the requisite qualifications, it will be invalid and will be quashed by a plea on arraignment.⁵ The objection must be taken on a motion to quash, and if the prisoner proceed to trial, it will be too late after trial and verdict to make the objection.⁶ It is a rule that if a person proceed to trial on an indictment, he waives whatever defects may be in the indictment, or any incompetency in the grand jurors find-

¹ In Alabama, formerly a grand juror was required to be a freeholder or householder at the time when his name was returned to the clerk by the sheriff, or he was not competent (5 Port. 484), but by act of 1868, the list is to be taken from registered voters. In Indiana a person qualified to serve must be either a freeholder or householder. *State v. Herndon*, 5 Blackf. 75. Also in Virginia. 6 Gratt. 695. Also in New Jersey. 1 Halst. 332. In Mississippi, by Constitution 1870, art. 1, § 13, "No property qualification shall ever be required of any person to become a juror," and it was held so in *Head v. State*, 44 Miss. 731. In Arkansas there is a singular requirement for a grand or petit juror, that they shall swear they have no connection with the "Knights of the White Camelia," or "Ku-Klux." Gantt's Dig. § 1521. A property qualification is required in Delaware. Rev. Stat. c. 109, § 2. In Michigan the grand jury is taken from a list of taxable citizens on the assessment rolls. Comp. Laws (1871), § 5977. In Tennessee, one who is a freeholder or householder. Rev. Stat. (1871), § 4002. In Texas, freeholders in State, or householders in the county. Paschall's Dig. § 3975. In California the jury is taken from those assessed on the last assessment roll of the county. Code Proced. § 198.

² 2 Hale P. C. 155.

³ 2 Hale P. C. 220.

⁴ *Kitrol v. State*, 9 Florida, 9. But it has been held that an indictment is not bad if one over sixty years be on the jury. *Booth v. Commonwealth*, 16 Gratt. 519.

⁵ *Barney v. State*, 12 S. & M. 68; *State v. Middleton*, 5 Port. 484.

⁶ *The State v. Martin*, 2 Ired. 101; *The State v. Lamon*, 3 Hawks, 175.

ing it. This is a rule to prevent dilatory pleas, which are not favored.¹

If the juror possessed the necessary property qualification at the time the selection was made, he is not considered disqualified if he does not possess the required property qualification at the time he is called upon to serve on the grand jury.²

§ 45. **Selection and Organization.** — In England, the sheriff of each county is directed by a precept issued to him for that purpose, to return twenty-four or more persons out of whom the jury is to be taken and sworn; and "if there be thirteen or more of the grand inquest a presentment by less than twelve ought not to be, but if there be twelve assenting, though some of the rest of their number dissent, it is a good presentment."³ The number sworn, however, must not exceed twenty-three,⁴ nor less than twelve, or the defect is fatal.⁵ In England, the sheriff is thus intrusted with very large and responsible powers, which it was found were frequently improperly exercised; and hence we have, in our method of selection, restricted these powers, for we, as a general rule, make a selection by lot. Thus in Massachusetts and the New England States generally, the selection is by lot "from a body of the most respectable citizens in the several towns in the county, whose names are kept in a box which is called the 'jury box,' and from which the jurors are drawn."⁶ In New York it is made the duty of the supervisors of the several counties (except in the city of New York, where the duty is intrusted to the mayor, recorder, and aldermen), to prepare at the annual meetings a list of the names of three hundred, to serve as grand jurors, from among which, after having been deposited in a box and sealed until the period of selection arrives, the names

¹ *People v. Griffin*, 2 Barb. 427; *Fenalty v. The State*, 7 Eng. 630; *State v. Ingalls*, 17 Iowa, 8; *The State v. Motley*, 7 Rich. 327; *People v. Robinson*, 2 Park. Cr. R. 235; *People v. Johnston*, 48 Cal. 549; *Shropshire v. The State*, 12 Ark. 190; *Morgan v. The State*, 19 Ala. 556; *Conkey & Harrington v. The People*, 5 Park. Cr. R. 31; *Dawson v. The People*, 25 N. Y. 399; 2 Benn. & H.'s Leading Crim. Cas. 317; *State v. Seaborn*, 4 Dev. 305.

² *State v. Ligon*, 7 Port. 167; *State v. Middleton*, 5 Port. 484.

³ 2 Hale P. C. 161.

⁴ *Rex v. Marsh*, 6 Ad. & E. 242.

⁵ *Croke Eliz.* 654; *State v. Symonds*, 36 Maine, 128.

⁶ *Davis' Precedents of Indictments*, 32.

of twenty-four persons are drawn (thirty-six in the city) in the presence of certain officers. It is then the duty of the sheriff to summon those so drawn on a panel.¹ In Virginia they adopt almost the English practice in intrusting the sheriff with the power to summon twenty-four to serve on a grand jury.²

The Revised Statutes of the United States provide:³ "Every grand jury impanelled before any district or circuit court, shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district or from the bystanders a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose." In Pennsylvania the original selection of the names of those who are to be placed within the wheels from which juries are, at the proper time, to be drawn, is intrusted to the sheriff and at least two of the county commissioners; and it is made the duty of the same officers when any writ of *venire* issues, to draw from the proper wheel the names of so many persons to be jurors as may be required by the writ.⁴

¹ 2 Rev. Stat. 724.

² Davis' Virg. Cr. Law, 423.

³ Section 808.

⁴ Act April 14, 1833. The number composing a grand jury in our States varies from thirteen to twenty-three, as in Massachusetts. 2 Cush. 149. In Arkansas a grand jury must consist of sixteen legally qualified men. *State v. Hawkins*, 5 Eng. 71. In New York there shall not be more than twenty-three nor less than sixteen sworn on any grand jury; 2 Rev. St. 724; the same in Wisconsin. 4 Wis. 395. In California not less than nineteen. Code Proc. 242. In Mississippi not more than eighteen nor less than thirteen. 34 Miss. 614. In Oregon the jury is composed of seven. Gen. Laws (1874), § 914. In almost all our States there are directions regarding the time at which the *venire* is to issue before the opening of the court. It is not less than seven nor more than thirty days in Massachusetts; Gen. Stat. p. 857; ten days in Ohio. Rev. Stat. p. 753. A failure to comply with these directions as to the time and the manner of summoning, will not constitute a valid body. The sheriff's return to the order ought to evince his authority, whether it be by writ or by statute. *Chase v. State*, 1 Spencer, 218. The certificate of an officer selecting a grand jury is generally conclusive. *State v. Clarkson*, 8 Ala. 378.

§ 46. **Mistakes in summoning.**—Compliance with the forms and mode pointed out by statute for summoning a grand jury is necessary; any omission or violation of the mode will be sufficient to justify the quashing of the indictment.¹ Thus, when a *venire* was issued for a grand jury, a mistake was made, and a petit jury was assembled; it was held that the body could not act as a grand jury.² And where a statute required thirty-six to be summoned on a panel from which the grand jury should be taken, and forty were summoned, the indictment was quashed.³ Where the caption of an indictment declared that it was found by "the grand jurors of the State of Wisconsin, to wit, twelve good and lawful men," and the statute of the State required not more than twenty-three nor less than sixteen to be sworn on any grand jury, the indictment was declared bad.⁴ But if the necessary minimum number are on the grand jury when an indictment is found, it will be good. So when three of a grand jury of sixteen were challenged by the defendant and excused, and the remaining thirteen found an indictment, it was held good.⁵

There are some omissions, however, in the summoning of a grand jury, that will not be fatal to its validity; for it is held that some directions are formal, and a failure to comply with them will not render the proceedings void. Thus the provis-

¹ Vattier v. State, 4 Blackf. 72; State v. Williams, 1 Richardson, 188.

² People v. Earnest, 45 Cal. 29.

³ Leathers v. State, 26 Miss. 73.

⁴ Fitzgerald v. State, 4 Wis. 395.

⁵ People v. Gatewood, 20 Cal. 146; The State v. Miller, 3 Ala. 343. See Mesmer v. Commonwealth, 26 Gratt. 976.

Where a statute makes eighteen the maximum number, a grand jury composed of nineteen is illegally constituted, and its acts void. Miller v. State, 33 Miss. 356. In Mississippi, if a grand jury is not formed in the way prescribed by statute, they have no power to find a valid indictment. Stokes v. State, 24 Miss. 621. After a grand jury has been impanelled, sworn, and charged, the court has no authority to discharge one of their number on account of the illness of his wife, and substitute another; and if such substitute take part in the deliberations of the grand jury, the whole body is vitiated, and all its acts are void. Portis v. State, 23 Miss. 578. A whole grand jury was discharged because three of them were incompetent, and another was summoned, and it was held that the latter was not a legal grand jury. The State v. Jacobs, 6 Tex. 99. In case of a deficiency of grand jurors, the court has no authority to issue *venires* to supply such deficiency; persons added to a grand jury by means of *venires* so issued are not legally members thereof. State v. Symonds, 36 Maine, 128. An indictment need not state the number; it will be sufficient if it states "they were of the number and qualifications required by law good and true men." People v. Bennett, 37 N. Y. 117.

ion of a statute requiring that grand jurors shall "be summoned at least five days before the first day of the court" to which they are summoned, is merely directory to the sheriff, and for the convenience of jurors, and is not essential to a legal organization of the grand jury.¹ And if by failure or neglect of the county court or sheriff, no jurors are summoned, the circuit court would have the implied constitutional power to direct the sheriff to summon forthwith the requisite number of qualified persons to serve as grand jurors for the term.² The principle on which a court acts when objections are made to the selection and summoning of grand jurors is well stated in *United States v. Reed*,³ where it is held, that although there may be technical objections to the proceedings in point of strict regularity, yet unless they have prejudiced the accused the court will not set them aside.

A *venire facias* to summon a grand jury is not void for want of the court from which it is issued;⁴ and it is not necessary that the return of the *venire facias* should be technically stated in the record; if it appear that the writ issued, and that the grand jury was composed of persons named in the writ, it will be presumed they are the same, and it is immaterial whether they were summoned or not.⁵ It is no valid objection to a grand jury that the judges of election in the various townships returned in all eighty-five, instead of seventy-five names, from which to select the grand jurors, the extra names being stricken off before the grand jury was drawn.⁶

§ 47. Challenge to Grand Jury. — The right to challenge a grand jury is denied by some English authorities. Hawkins alleges the right of challenge to a grand juror by any one under a prosecution for a crime before he is indicted.⁷ This is denied to be law by Joy in his work, *Challenge to Jurors*.⁸ In Sheridan's case⁹ the court of King's Bench of Ireland, after full discussion, decided that a challenge could not be made to a

¹ *Johnson v. State*, 33 Miss. 363.

² *Straghan v. State*, 16 Ark. 37; *People v. Rodriguez*, 10 Cal. 50; *Wilburn v. State*, 21 Ark. 198; *Cyphers v. People*, 81 N. Y. 373; *State v. Lawry*, 4 Nev. 161.

³ 2 Blatchf. 435.

⁴ *Maher v. State*, 1 Port. 265.

⁵ *State v. Williams*, 3 Stew. 454.

⁶ *State v. Knight*, 19 Iowa, 94.

⁷ Book 2, ch. 25.

⁸ Page 122.

⁹ 31 How. St. Tr. 543.

grand juror; but objections to them must be pleaded. No authorities were cited beside Hawkins' opinion and the cases he quotes, except an opinion of Lord Holt, holding as was decided in this case. In the American States the right of challenge is recognized as a general rule.¹ The challenge to a grand juror must be made before the jurors are sworn, and can only be made for the causes stated in the statute.² It was decided that it is not a good cause of challenge to the array of grand jurors, that the sheriff who summoned them was the son of the prosecuting attorney.³ An objection to the mode in which the board doing county business discharged its duty as to the selecting and drawing grand jurors, must be made by way of challenge before the grand jurors are sworn, in the State of Indiana.⁴

In some States, challenges to the array of the grand jury are abolished, because under our system of selecting and summoning grand jurors, there is not much danger of an improper selection by the sheriff as is the case in England. In England, the sheriff, on receiving the *venire* makes a selection of the jurors from the body of the county, at his discretion. But according to the system adopted in some States, as for instance in the State of New York, they are selected from the body of the county by the board of supervisors, and separate ballots containing their names are placed in a box kept by the clerk of the county, from which the requisite number are drawn by lot to form the jury. Hence in that State challenges are allowed only to individual jurors, either on the ground that he is a prosecutor or complainant against the person, or that he is a witness on the part of the prosecution.⁵ If any improper

¹ The right of challenge is recognized in New York. 2 Rev. St. 724. In California. Penal Code, 895. See *Commonwealth v. Smith*, 9 Mass. 107; *People v. Jewett*, 3 Wend. 314; *Commonwealth v. Clark*, 2 Browne (Penn.), 323; *Ross v. State*, 1 Blackf. 390; *Jones v. State*, 2 Blackf. 476. In this last case the commonwealth was allowed to challenge, and the prisoner was called into court that he might have his challenges before the grand jury was sworn. See, also, 7 How. St. Tr. 249, where a case is reported in which the crown officer is said to have challenged grand jurors. Upon the impanelling of a grand jury one of them was challenged, and the challenge being sustained he was directed to withdraw, leaving fourteen to find the indictment; it was sustained. *State v. Ostrander*, 18 Iowa, 435.

² *State v. Welch*, 33 Mo. 33.

³ *State v. Cameron*, 2 Chand. (Wis.) 172.

⁴ *Bellair v. State*, 6 Blackf. 104.

⁵ 2 Rev. St. 724, § 27.

selection may have been made by the returning officers, it could be taken advantage of at the time of pleading to the indictment by plea.¹

§ 48. **Swearing Grand Jury.** — From the earliest institution of the grand jury, an oath was administered to them binding them to the faithful performance of their duties, and this oath, with slight modifications, is still taken by this body. Hale says,² "They are sworn to keep the king's counsel undiscovered, the revealing or disclosing whereof was heretofore taken for felony, but that law is antiquated, it is now only finable."

The form of a grand juror's oath is given in the *Earl of Shaftesbury's case*,³ as follows: "You shall diligently inquire and true presentments make of all such matters, articles, and things as shall come to your own knowledge touching this present service; the king's counsel, your fellows, and your own you shall keep secret; you shall present no person for hatred or malice, neither shall you leave any one unrepresented for fear,

¹ *United States v. Reed*, 2 Blatchford, 435.

In California (Penal Code, § 895) challenges are allowed to the array for three causes only: 1. That the requisite number of ballots was not drawn from the jury box of the county; 2. That notice of the drawing of the grand jury was not given; 3. That the drawing was not had in the presence of the officers designated by law. A defendant not held to answer before the finding of an indictment, is entitled on motion to have the indictment set aside, when it is shown that he had at the time the grand jury was impanelled a good ground of challenge to one or more of the grand jurors who found the indictment. *People v. Turner*, 39 Cal. 377. A refusal to allow a challenge, renders the indictment worthless. *People v. Romero*, 18 Cal. 89.

It is incompetent for a party who anticipates being presented to the grand jury for crime to question the jurors as to any matter of disqualification, except such as is recognized and enumerated by the laws of the State. *State v. Cameron*, 2 Chand. (Wis.) 172. Irregularities in selecting and impanelling the grand jury, which do not relate to the competency of individual jurors, can in general only be objected to by a challenge to the array. Incompetency or want of the requisite qualifications of the jurors may be pleaded in abatement to the indictment. *Vanhook v. State*, 12 Texas, 252. See, further, *People v. Geiger*, 49 Cal. 643. The state or prosecutor in Iowa cannot challenge the panel or individual members of the grand jury. *Keitler v. State*, 4 Greene, 291. The panel can be challenged when the jury were not appointed, drawn, and summoned as prescribed by law. *State v. Howard*, 10 Iowa, 101.

Where one indicted for a criminal offence on being arraigned moves to set aside the indictment on the ground of irregularities in selecting, summoning, and impanelling the grand jury, the motion is in effect a challenge to the panel. *People v. Southwell*, 46 Cal. 141.

² 2 P. C. 161.

³ 3 Harg. St. Tr. 417.

favor, or affection, for lucre or gain or any hopes thereof; but in all things you shall present the truth and nothing but the truth to the best of your knowledge. So help you God." We have made but little alteration in this form, and it is substantially the oath laid down in our statutes generally. The following is the form in Massachusetts, which may be taken as the form of the general oath administered:—

"You, as grand jurors of this inquest, for the body of this county of —, do solemnly swear that you will diligently inquire, and true presentment make of all such matters and things as shall be given you in charge; the commonwealth's counsel, your fellows, and your own, you shall keep secret; you shall present no man for envy, hatred, or malice, neither shall you leave any man unpresented for love, fear, favor, or affection, or hope of reward; but you shall present things truly, as they come to your own knowledge, according to the best of your understanding; so help you God."¹

The oath is generally administered to the foreman, and then to the others, in sets of three or four, the following: "The same oath which your foreman hath taken on his part, you and every of you, shall well and truly observe and keep on your part; so help you God." And if the record finds that the foreman of the grand jury was sworn, this is not sufficient to raise the presumption that the residue were sworn, in the absence of any finding of record.² But a record that the grand jury were sworn "according to the statute" is sufficient proof that the required oath was administered.³ Where the record finds that D. B. was sworn as foreman of the jury, this necessarily implies that he was appointed, and is sufficient. So, if it appears that the jurors were sworn, it will be intended that they were "then and there" sworn.⁴ It was held in Michigan, that a grand juror who appears after the jury have been sworn and received the charge of the court, may or may not be sworn, in the discretion of the court, when there are enough grand jurors without him.⁵

¹ Genl. St. p. 837.

² *Cody v. State*, 3 How. (Miss.) 27.

³ *Pierce v. State*, 12 Tex. 210.

⁴ *Woodside v. State*, 2 How. (Miss.) 655.

⁵ *Findley v. The People*, 1 Mann. 234. In *Brown v. State*, 5 Eng. (Ark.) 613, C. J. Johnston, delivering the opinion of the court, said: "The form of the oath

§ 49. *Obligation of Secrecy.* — It is required in the oath administered to grand jurors, that they shall keep their proceedings secret; but it frequently happened that exigencies arose requiring some testimony on behalf of grand jurors as to what occurred before them. Then it became necessary to consider whether there was an absolute injunction against any evidence whatever as to what took place, or whether this secrecy, when the object of it had been accomplished, could be removed. The reason of such an obligation has been variously stated. It was held that the object of this secrecy was only to prevent the testimony produced before them from being counteracted by subornation of perjury on the part of the persons against whom true bills were found.¹ The true reason is stated by Greenleaf on Evidence, where he says,² "One reason may be to prevent the escape of the party should he know that proceedings were in train against him; another may be to secure freedom of deliberation and opinion among the grand jurors, which would be impaired if the part taken by each might be made known to the accused." This being the true reason, it became lawful for a grand juror to give his evidence as to what passed, if it was necessary to further the ends of justice, as to prove that a person committed perjury by swearing differently before the grand jury.³ It is generally agreed that a

required to be administered to the grand jury is of ancient origin, and it is necessary that it should be observed, at least in substance; but the mode or order of administering it is purely a matter of practice, and must of necessity be governed by circumstances. The practice in England was to administer the entire oath first to the foreman in the presence of his fellows, and then to call three of the others at a time, and swear them to keep and observe the same oath that their foreman had taken. The usual practice in this country is believed to be, first to administer the entire oath to the foreman, in the presence of his fellows, and then to call four of them at a time, and require them to keep and observe the same oath that he has taken. It is conceived to be entirely a matter of practice as to the number that shall be sworn at a time, and that such practice is regulated alone by considerations of convenience."

The law requiring a prescribed oath to be administered, the court will presume such oath was administered, when the record, by hiatus, fails to recite the fact, but after giving their names, proceeds: "Who were — and charged by the court as directed by law." *Commonwealth v. Pullman*, 3 Bush (Ky.), 47.

¹ 4 Bl. Com. 126, note.

² 1 Evid. § 252.

³ The foreman or any member of the grand jury may be called and compelled to testify what a witness stated before the grand jury, for the purpose of contradicting such witness, or for any other purpose, when, in the opinion of the court, the cause of justice requires it to be done. *State v. Wood*, 53 N. H. 484.

grand juror may be called upon to give testimony in such a case without a violation of his oath.¹

For this reason the form of oath administered to a grand jury, in some States, makes a provision for such a case. Thus, in Ohio, the oath provides, "The counsel of the state, your own, and your fellows, you shall keep secret, unless called on in a court of justice to make disclosures."²

Beyond this instance the decisions are not well agreed as to how far, and when, a grand juror will be permitted to disclose what passed in the grand jury room. In *Rex v. Marsh*,³ the court refused to allow a grand juror to swear as to what passed in the grand jury room as to the number that found the bill; but in *Low's case*⁴ it was held that a grand juror may be called to testify that twelve did not concur in the finding, and with this agrees *Greenleaf on Evidence*, where he says, "Grand jurors may also be asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of the fact."⁵

A grand juror will not be permitted to testify how a witness swore, except in a prosecution for perjury.⁶ Thus in an action for a malicious prosecution, in which it was alleged by the plaintiff that the defendant appeared before the grand jury, and without probable cause, &c., caused plaintiff to be indicted for perjury, no grand juror can be permitted to testify and disclose the name of any witness who appeared before said jury.⁷ This decision carried the obligation farther than is probably justified; and it is held that it is no violation of the oath merely to testify that a certain person, naming him,

¹ *Regina v. Hughes*, 47 L. R. (Eng.) 519. The obligation of secrecy resting on a grand jury is only temporary, and if after the objects intended to be accomplished by it are effected, it shall become necessary to the attainment of justice and the vindication of truth, the obligation would be no longer in force. *Jones v. Turpin*, 6 Heisk. 181.

² 1 Rev. St. 753. "Witnesses cannot take advantage of this obligation in a criminal prosecution against them." *People v. Young*, 31 Cal. 563.

³ 6 Ad. & E. 236.

⁴ 4 Greenl. R. 439. But in a late case in Iowa it has been held that affidavits of grand jurors cannot be admitted to show that an indictment was not found by the concurrence of twelve, on a motion to quash. *State v. Gibbs*, 39 Iowa, 318.

⁵ 1 Evid. § 252.

⁶ *Tindle v. Nicholls*, 20 Mo. 326.

⁷ *Beam v. Link*, 27 Mo. 261.

testified before the grand jury. Thus, in *Freeman v. Arkel*,¹ one of the grand jurors was called and proved who was the prosecutor on a bill of indictment; it is said in a note, "that a grand juror may be called to prove any substantive fact within his knowledge, but not anything which he hears as a grand juror, or which comes within his oath of secrecy." In *Sykes v. Dunbar*,² Lord Kenyon is said to have held that a grand juror could be called to prove who was the prosecutor upon an indictment, because it was a question of fact, the disclosure of which did not infringe the grand juror's oath. And in the proceedings upon bill of attainder against Sir T. Fenwick, the House of Commons admitted evidence by grand jurymen of what witnesses were before them, and what they said.³ In Connecticut the prisoner may be present during the examination of witnesses before the grand jury. But the secrecy of their proceedings is held to be perpetual, and to comprehend all others who are present, as well as the jurors themselves.⁴

§ 50. *Charge to the Grand Jury.*—Before the grand jury can proceed to their duties, it is obligatory on the court to specially charge them on the nature, scope, and importance of these duties; and to draw their attention to any matters calling for their action and deliberation. In almost all our States, the matters on which they are to be charged, are specifically laid down in statutes; and it would not therefore be practicable to enumerate these various matters, which are constantly being modified or enlarged according to the wisdom of the legislature.

The record need not show that the grand jury were charged; where it is not made apparent by a bill of exceptions that such a charge was not given, the court above will presume that the judge of the court below performed his duty and gave the charge as required by law;⁵ and if it appear of record

¹ 1 Car. & P. 135.

² Quoted in Selwyn's N. P. (Wharton's edit.) p. 260.

³ 5 State Tr. 72.

⁴ *State v. Fassett*, 16 Conn. 464. In an action of slander against one who had given testimony before a grand jury in relation to the charge which was the basis of the slander suit, it was held that the court might, in its discretion, permit the grand jurors to testify on the subject. *Sands v. Robinson*, 12 S. & M. 704.

⁵ *McQuillen v. State*, 8 S. & M. 587.

that a grand jury elected, impanelled, sworn, and *charged*, returned a bill of indictment, it will be intended to have been done regularly until the contrary is shown by plea.¹

Chitty has most ably pointed out the general duty of the judge in his charge to a grand jury. He says: "In the performance of this duty, the judicious magistrate will take care not only that his remarks are in general suited to the offices which a grand jury have to discharge, but have a plain reference to local objects, events, discussions, and concerns, as far as they properly fall within the limits of his jurisdiction, and seem entitled to his notice. He will strive to allay animosities, to destroy the spirit of party, to discountenance every receptacle of idleness and vice, as well as every vestige of popular barbarity and grossness. When the charge is concluded, the recognizances to prosecute and give evidence are called, so that bills may be drawn and preferred."²

After a grand jury have been sworn, Blackstone says "they are previously instructed in the articles of inquiry by a charge from the judge who presides upon the bench."³

§ 51. **Powers and Duties of Grand Jury.** — The powers and duties devolving upon a grand jury have always been recognized in our system of law, as of the gravest importance and responsibility;⁴ but all are not agreed as to the exact nature and the full scope of these powers. The original foundation of the institution of a grand jury contemplated it as an inquisitorial body, who would of their own motion, by their own knowledge bring offenders to trial whom no one dared publicly to accuse. They were, therefore, empowered to present accusations themselves against culprits known to them; and the same is still the case. When the grand jury acts in this manner, it is said to make a *presentment*; when it finds a case specially committed to

¹ *State v. Lassley*, 7 Port. 526.

² 1 Chitty Cr. L. 256.

³ 4 Com. 305.

⁴ The Constitution of the United States (Amend. art. 5) provides: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces," &c. In *State v. Keyes*, 8 Vt. 57, this provision is construed as extending only to offences cognizable in the courts of the United States; so held in *Boring et al. v. Williams*, 17 Ala. 510; *Lake Erie &c. R. R. Co. v. Heath*, 9 Ind. 558; *Colt v. Eves*, 12 Conn. 243.

it by a prosecutor, it is said to find an *indictment*. However, in modern times, the former power, of presenting an offender on their own knowledge, is very much questioned, and in practice at the present time, the grand jury merely act upon such matters as are officially laid before them by the public prosecutor. Still it cannot be denied that they have the power, if they have any knowledge of public offences, to cause the offender to be called upon to answer after investigation.¹ In the case of *Commonwealth v. Crans*,² it is claimed that grand juries can legitimately act in one of three ways. First, on accusations given them in charge in the shape of bills of indictment, framed by or under authority of the public prosecutor. Second, under presentment made by them of crimes, misdemeanors, and public evils requiring judicial notice, existing within their own knowledge. Third, in carrying into execution certain functions which have been vested in them by statutes, principally if not exclusively of an administrative character. Parsons, J., said further in this case: "I have been unable to find any rule of the common law that extends beyond this, and we have no statute law which gives any authority for any other exercise of their functions. For an individual to attempt it and endeavor to influence their action is criminal."

§ 52. *Personal influence on a grand jury*, has from the earliest period been recognized as an evil, and has been specially guarded against. The powers confided to a grand jury are very serious in their consequences; and the temptation to private malevolence or revenge to influence these powers, is very great. To discourage and hinder such an influence, so dangerous to individual liberty, has been a principal aim of the law, which treats an attempt of this kind as criminal. This was held in the case above quoted, *Commonwealth v. Crans*; and it was so regarded by the common law. It is there said, "It is a high contempt of the court, an obstruction of the administration of justice, and the tendency of all such acts is to corrupt the fountains of judicial tribunals, which for the safety

¹ *Ward v. State*, 2 Mo. 120; *U. S. v. Tompkins*, 2 Cranch C. C. 46; *State v. Wolcott*, 21 Conn. 272.

² 3 Penn. L. J. 453. The powers and duties of a grand jury are explained and defined in *Matter of Lloyd*, 3 Penn. Law J. 188.

of society should always be kept pure, and even free from suspicion." An abuse of this kind was the occasion of a very decided and clear charge in the United States Circuit Court for the District of California, where the powers and duties of a grand jury were ably expressed, in a charge by Justice Field.¹ He explained to the jurors in what manner they could acquire the knowledge necessary for the exercise of their functions, and enumerated four ways in which this knowledge could be acquired: 1. First, such matters as may be called to their attention by the court; 2. Such as may be submitted by the district attorney to their consideration; 3. Such as might come to their knowledge in the course of investigations brought before them, or from their own observation; and 4. Such as came to their knowledge from the disclosures of their associates.

He warned them "not to allow private prosecutors to intrude themselves into your presence, and present accusations. Generally such parties are actuated by private enmity, and seek merely the gratification of their personal malice. If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney, who will seldom fail to act in a proper case. But if the district attorney should refuse to act, they can make their complaint to a committing magistrate, before whom the matter can be investigated."²

To check an evil of this kind Congress has passed a very stringent law, viz: "Every person who corruptly, or by threats or force, or threatening letters, or any threatening communications, endeavors to influence, intimidate, or impede any grand or petit juror of any court of the United States in the discharge of his duty, or who corruptly or by threats or force, impedes the due administration therein, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."³

§ 53. Duty as to finding Indictments.— What amount of

¹ 2 Sawyer, 668.

² It is not allowable for individuals with their witnesses to go before the grand jury and prefer charges. Such a course deprives the accused of a responsible prosecutor who can be made liable in costs, and also to respond in damages for false and malicious prosecution. *McCullough v. Commonwealth*, 67 Pa. St. 30.

³ U. S. Rev. St. § 5404.

evidence, what kind of evidence, and how far a grand jury shall make inquiry before finding an indictment, are considerations of extreme importance, and in connection with their duty need to be well weighed. While some maintain that they are only to find an indictment on a *prima facie* case, on such a case as, without explanatory or exculpatory evidence, would require a conviction, others maintain they are to go farther and weigh the evidence, the credibility of the witnesses, and call for any other evidence likely to explain or modify the evidence against the accused. The former is laid down by Hale, who says they "ought only to hear the evidence for the king; and in case there be probable evidence they ought to find a bill, because it is but an accusation, and the party is to be put on his trial afterwards."¹ According to this doctrine, the grand jury in Lord Shaftesbury's case were instructed, "If there be *probable ground* it is as much as you are to inquire into;" and it was held that the grand jury were not to judge of the *credibility* of the witnesses sent to them.² But this doctrine was advanced by a court notoriously subservient to the royal power, and who plainly labored for an indictment, and must be discarded as a dangerous principle. But an able judge more correctly held that it was the duty of the grand jury to judge of the *credibility* of the witnesses sent to them; because, he says, the grand jury are to judge of their own knowledge as well as by the evidence of witnesses."³

In *Respublica v. Shaffer*,⁴ it was said to be the duty of the grand jury diligently to inquire into the *credibility* of the witnesses; though the right of the defendant to produce evidence to exculpate him was not admitted. This is undoubtedly the true and safe doctrine, and one that should be adhered to in every indictment; and this is forcibly put in the charge of Justice Field, already quoted, when he says, "In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence. Subject to this qualification, you will receive *all* the evidence presented,

¹ 2 P. C. 157.

² 3 State Tr. 417.

³ Sir John Hawles in 4 State Tr. 183, and Blackstone (4 Com. 303) say, "they ought, however, to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied with merely remote probabilities."

⁴ 1 Dall. 136.

which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more: if, in the course of your inquiries, you have reason to believe that there is other evidence, not presented to you, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced."¹

It seems to be generally agreed that the grand jury must either find a true bill or otherwise reject; they cannot take upon them to find specially or conditionally, or to be true for part only, and not for the rest;² and Hale lays it down, "If A. be killed by B. so that it doth *constare de personâ occisi et occidentis*, and a bill of murder be presented to them regularly, they ought to find the bill for murder, and not for manslaughter, or *se defendendo*, because otherwise offences might be smothered without due trial."³

§ 54. The powers of a grand jury are limited to the county for which they are appointed. Thus Hale speaks of their power in this respect: "The grand jury are sworn *ad inquirendum pro corpore comitatus*, and therefore regularly they cannot inquire of a fact done out of that county for which

¹ In *United States v. White*, 2 Wash. 29, it is held that witnesses for the defendant are never sent to the grand jury but by the consent of the prosecution. Evidence before the grand jury must be under oath, and the best evidence, not hearsay or second hand. 2 Hawk. c. 25, §§ 138, 139. It was decided that a grand jury having received the testimony of a person not under oath, the indictment should be quashed, as irregularly found. 2 Gallatin, 364. But an indictment will not be quashed if there be sufficient evidence before the grand jury on which upon their oaths they could fairly act; it is for them to determine the weight. *People v. Strong*, 1 Abb. Pr. R. 244, N. S. In *State v. Boyd*, 2 Hill (S. C.), 288, it is held, the court will in no instance inquire into the character of the testimony which has influenced the grand jury in finding an indictment. It is said in *Rex v. Russell*, 1 C. & M. 247, that it would be improper for the court to inquire whether the witnesses before the grand jury had been properly sworn, because such error would not vitiate the bill, inasmuch as the jury may find a bill *upon their own knowledge merely* — a doctrine which it is hoped will never be followed here. See *Stewart v. State*, 24 Ind. 142; *People v. Hulbut*, 4 Denio, 133. The court has no power to revise the judgment of a grand jury upon the evidence for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint. *United States v. Reed*, 2 Blatchford, 435.

² 2 Hawkins, 210; *State v. Cowan*, 1 Head (Tenn.), 280; *State v. Willhite*, 11 Humph. 602.

³ 2 Hale P. C. 158.

they are sworn, unless specially enabled by act of Parliament, but only in some special cases."¹ This led to an immunity from indictment for such crimes as were begun in one county and consummated in another. The defect was remedied by statute 2 & 3 Edw. VI. c. 24, which allowed an indictment to be made in the county where a party died, though the stroke or act was in another county, and the offender should be tried there, but an appeal may be brought in either county.² But by statute 7 Geo. IV. c. 64, this statute was repealed, and it is enacted that when any felony or misdemeanor shall be begun in one county and completed in another, or shall be committed on the boundary or boundaries of two or more counties, or within five hundred yards thereof, it may be tried or punished in either. And substantially similar enactments will be found in our statutes.³

It is strictly required that the county for which the grand jury is appointed shall appear in some part of the record; because otherwise it cannot appear whether they had jurisdiction to bring in an indictment. This appears usually in the caption. It is held that the caption of the indictment must state with sufficient certainty the style of the court, the place at which the indictment was found, and the jurors by whom it was found;⁴ and that the *venire* of the grand jury, and their names, need not be introduced in an indictment.⁵

Where an indictment purports to be found by "the grand jurors of the State of Ohio, inquiring of crimes and offences within and for the county of Monroe," it must be taken to be a grand jury of that county, as well as of the State, and it is therefore found by such a body as the law intends.⁶

The caption of an indictment showed the impanelling of a grand jury in the county of Sullivan, State of Indiana, and the indictment was entitled, "State of Indiana, Sullivan County," &c., and commenced, "the grand jurors of the State of Indiana, being duly impanelled, sworn, and charged

¹ 2 Hale P. C. 162.

² 2 Co. Rep. 2 (a).

³ See 2 Rev. St. (N. Y.) 727, § 45; Purdon's Dig. (Penn.) 258; Penal Code (Cal.), § 781.

⁴ 5 How. (Miss.) 20.

⁵ State v. Murphy, 9 Port. 487.

⁶ Mackey v. State, 3 Ohio (N. S.), 362.

to inquire of crimes and offences committed within the body of the county of Sullivan, in the State of Indiana, upon their oaths present," &c., it was held that the county in and for which the grand jury was impanelled was sufficiently shown.¹

§ 55. Witnesses before the grand jury were formerly sworn in open court, previously to their going before the jury. If a witness who is sent to the grand jury be thus sworn, though not in the immediate presence of the judge or in his temporary absence from the bench, it is good.² The reason of this requirement was the inability of a member of the grand jury to administer an oath to a witness. This power is now generally conferred by the statutes of the various States on the foreman, who can administer the oath to such witnesses as are produced in support of the charge.³

In Connecticut witnesses before a grand jury, according to settled and uniform practice, are sworn by a magistrate in the grand jury room and not in court, and this is declared a lawful mode of administering the oath.⁴

The secret inquisitorial proceedings of the grand jury may, as they often have, work very oppressively and unjustly; for only so far as guarded and restrained by an oath, their action

¹ *Lovell v. State*, 45 Ind. 550. The omission of the words, "body of the county," in an indictment, the caption of which recites that the grand jury were sworn and charged "inquiring in and for the county of," &c., is not an informality which prejudices the defendant or vitiates the indictment; *Fizell v. State*, 25 Wis. 364; and a misrecital of the name of the county in the caption of an indictment is no ground for an arrest of judgment. *State v. Sprinkle*, 65 N. C. 463. It cannot be presumed by the court that an indictment was found by the grand jury of the proper county in the absence of any statement in the record to that effect. The record must show that fact. *Clark v. State*, 1 Ind. 253.

² *Jetton v. State*, Meigs, 192.

³ Such an authority is given in Massachusetts. Rev. St. c. 136, § 9. In New York, New Jersey, Vermont, and Texas. 2 N. Y. Rev. St. 724; Rev. L. of N. J. tit. 34, c. 13; Rev. St. of Vt. c. 35, § 16; Hartley's Dig. Texas, art. 1655. In California. Penal Code, 918. In Pennsylvania the authority is expressly limited to such witnesses "whose names are marked by the attorney general on the bill of indictment," and consequently all others may be sworn in open court. Wharton's Crim. L. p. 123. In New York, Vermont, and Mississippi the foreman is appointed by the court; in others, as in Maine, Massachusetts, Michigan, they elect the foreman after they retire. In California the foreman is to be appointed by the court. Penal Code, 902.

⁴ *State v. Fassett*, 16 Conn. 457.

is generally irresponsible and conclusive in finding an indictment. During the whole of their proceedings, they are protected in the discharge of their duty, and no action or prosecution can be maintained, no matter how they may be actuated by malice or indiscretion.¹

To require a suppression or a concealment of the names of such witnesses as appeared before them in support of the charge, is certainly a very dangerous doctrine, and has a tendency to render their proceedings still more irresponsible and oppressive.

To refuse the names of such witnesses to be given to an accused would be a manifest injustice, and would often shield a vindictive prosecutor from the responsibility of an unjust charge. To have the names of such witnesses is a right of the dearest and most essential kind; and unquestionably is sanctioned by the spirit of the common law.² It was further the practice in the common law to allow a witness examined before the grand jury, to be placed on the witness stand, to be cross-examined by the prisoner's counsel, though the prosecution did not think fit to put him on.³ Lest there should be any doubt of such a right, and it is a wonder there ever could be, the statutes of the various States require the names of such witnesses as were sworn, and testified before the grand jury, to be indorsed on the bill when returned into court.⁴

¹ 2 Hale P. C. 162; 1 T. R. 513, 535; 1 Lord Raym. 469.

² 3 Burn, 901; Arch. C. P. by Jervis, 13.

³ Rex v. Vincent, 9 C. & P. 91; Rex v. Beezley, 4 C. & P. 220.

⁴ In Massachusetts the grand jury usually return the names of all the witnesses examined by them, without specifying the bills; but in a leading case, where the prisoner's counsel requested that a list of the witnesses before the grand jury should be given, the court granted the application without doubt, it being remarked by Wilde, J., that such a request had never been refused. In Pennsylvania the act provides that no person or persons shall be obliged to answer to any indictment or presentment unless the prosecutor's name be indorsed thereon. 1 Smith's Laws, 56. In Kentucky it is held that the omission of the name of the prosecutor, his addition and residence, in cases of trespass, is fatal. Commonwealth v. Gore, 3 Dana, 474. In Mississippi, however, it is not necessary that the grand jury should return with the indictment the names of the witnesses examined or the evidence. King v. State, 5 How. 730. In Texas the statute makes it the duty of the foreman of the grand jury "to indorse on the back of each presentment or indictment, the name or names of the witnesses for the prosecution, on whose evidence the presentment or indictment was made, certifying thereto as foreman." Hartley's Dig. art. 1655. It is not the practice in the United States courts that the name of the prosecutor should be written at

But while this privilege is conceded, it is yet claimed that the grand jury may find a bill on their own knowledge on the evidence of one of their number ; because this was their ancient duty ; and that it is not necessary the name should be published. This doctrine is, however, condemned, and justly so, by the best authorities. Thus it is held, *State v. Cain*,¹ that the grand jury cannot find on the testimony of one of their number without an oath ; that the grand jury may make presentments on the knowledge of their own members, or one of them, and upon such a presentment the attorney general may frame a bill of indictment and send it to them, but they cannot find it except the grand juror becomes an accuser, is sworn in court, and gives again his statement on oath to the grand jury. And the same view is forcibly expressed in the opinion of King, President, in the court of quarter sessions in Philadelphia,² when the court refused its process to assist in an investigation of a charge made by an individual member of the grand jury. It is said, "the right of every member of a body like the grand jury to charge what crime he pleases, on whom he pleases, in the secret conclave of the grand jury room, might produce the worst results."

When a witness, duly summoned, appears before the grand jury, but refuses to be sworn and behaves in a disrespectful manner towards the jury, they may lawfully require the officer in attendance to take the witness before the court in order to obtain its aid and direction in the matter.³

the foot of the indictment. *United States v. Mundel*, 6 Call, 245. In Illinois the statute makes it the duty of the foreman of the grand jury to indorse on the indictment the names of the witnesses upon whose testimony the same shall have been found. *Gardner v. People*, 3 Scam. 83 ; *Gates v. People*, 14 Ill. 433. In California (Penal Code, 943), when an indictment is found the names must be indorsed at the foot before it is presented to the court ; and if not, the defendant must take advantage of the omission at the time of arraignment by motion to set aside the indictment. If not, the objection is waived. *People v. Lopez*, 26 Cal. 112. The witnesses' names are required to be indorsed in New York. 2 Rev. Stat. 724. That a memorandum of names of witnesses is not subjoined to a grand juror's complaint is in the nature of a dilatory plea, and must be made at the earliest opportunity, or will be considered waived. *State v. Norton*, 45 Vt. 258.

¹ 1 Hawks, 352 ; *State v. Roberts*, 2 N. Car. 542 ; *State v. Baker*, 4 Humph. 12.

² Wharton's Crim. Law, 115.

³ *Heard v. Pierce*, 8 Cush. 338. A judge has no right to require a grand jury to have the witnesses on the part of the State examined publicly. *State v. Branch*, 68 N. Car. 186.

§ 56. **Power of Court over Finding.** — That the grand jury are under the control and direction of the court is established. The charge given to them before the entrance on their duties expressly indicates this; and accordingly they are to be advised and directed in their deliberations by the court; and it is their duty to apply for advice to the court whenever in doubt in their proceedings.¹ They are not limited in their action merely to those matters to which their attention is directed; but they can, besides, inquire further.

It was formerly the custom to fine them for any refusal to comply with the direction of the court; of which Hale says: "But in my opinion fines set upon grand inquests by justices of the peace, oyer and terminer, or gaol delivery for concealments or non-presentments in any other manner, are not warrantable by law; and though the late practice hath been for such justices to set fines arbitrarily, yea not only upon grand inquests but also upon the petit jury in criminal cases, if they find not according to their directions, it weighs not much with me."²

The court has power to return the indictment if it be not properly found as appears from the record of the proceedings, which is the conclusive evidence of their action, and direct them to make a new presentment. Thus, if in an indictment for murder they find one for manslaughter against the testimony before them, the court will not receive it.³

It is, however, only in extreme cases that the court will interfere with the finding of a grand jury, as where testimony was received of a witness not sworn;⁴ or where a refusal is made to bring in a bill conformable to the charge and the testimony. It has been decided that the court has no authority for looking into and revising the judgment of a grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint;

¹ *State v. Squire*, 2 N. Hamp. 558; *Lewis' case*, 4 Greenleaf, 448.

² 2 Hale P. C. 160; 4 Bl. Com. 126. The court has power to discharge and fine a grand juror for intemperance. In *re Ellis*, 1 Hemp. 10.

³ 2 Hale P. C. 158; *State v. Cowan*, 1 Head (Tenn.), 280; *State v. Wilhite*, 11 Humph. 602; *State v. Mathis*, 3 Ark. 84; 1 Sid. 230; *Bacon's Abridgt. Indictment*, D.

⁴ *U. S. v. Coolidge*, 2 Gallatin, 364.

nor into the mode of the examination of witnesses for the purposes of invalidating an indictment.¹

The admission of oral testimony to contradict the record of the proceedings of a grand jury, would be highly dangerous to the efficiency of the institution, and would produce a great deal of confusion and inconvenience, necessitating often a trial by the court of their action; accordingly such evidence is not receivable, as it is trusted the oath required of the grand jurors will sufficiently bind them to a due and faithful performance of their duties. Hence testimony cannot be produced by a prisoner to show *how* an indictment was found, what the character of testimony taken was, or in any other mode to contradict the record.²

§ 57. The right of officers to be present with the grand jury, in the examination of witnesses, in conducting the proceedings, and in their deliberations, is in general admitted, though in some places it is denied or very much restricted. It is not unusual, says Chitty, except in the King's Bench, where the clerk of the grand juries attends them, to permit the prosecutor to be present during the sitting of the grand jury, to conduct the evidence on the part of the crown.³ Sir John Hawles, in his remarks upon Colledge's trial,⁴ says: "I know not how long the practice of admitting counsel to a grand jury hath been. I am sure it is a very unjustifiable and insufferable one. If the grand jury have a doubt in point of law, they ought to have recourse to the court and that publicly, and not privately; and not rely upon the private opinion of counsel, who at least behave themselves as if they were parties." However this may be, the practice is well estab-

¹ United States v. Reed, 2 Blatch. C. C. 435; United States v. Wilson, 6 McLean, 604.

² State v. Allen, 1 Ala. 442; Hall v. State, 4 Greene (Iowa), 73; Jeffries v. Commonwealth, 12 Allen, 145; Wickwire v. State, 19 Conn. 477; Tuck v. State, 7 Ham. 240; State v. Dayton, 3 Zab. 49. The cases in which the court on the motion of the party accused ought to quash, are where the court has no jurisdiction; where no indictable offence is charged; or where there is some other substantial and material defect appearing by the record. Bell v. Commonwealth, 8 Gratt. 600; Commonwealth v. Clark, 6 Gratt. 675; State v. Mitchell, 1 Bay, 269; Penn v. Oliphant, Addis. 345.

³ 1 Crim. Law, 316.

⁴ 4 State Tr. 173.

lished here that the district attorney, or prosecuting officer, has a right to manage the production of evidence to the grand jury and examine the witnesses, and this right extends to his clerk.¹ In Connecticut no counsel on the part of the state or of the prisoner are admitted to the grand jury; but the prisoner himself is allowed to be present and cross-examine the witnesses.²

§ 58. The signature of the foreman to the indictment is absolutely required before an indictment can be received or filed; it should be signed by the foreman as a true bill.³

It has been held in Maine that an indictment is properly certified if signed by the foreman with the initials of his christian name.⁴ Where an indictment was signed by the foreman of a grand jury, but the words "a true bill" did not appear over his signature, the indictment was held bad for that reason;⁵ where, however, the indefinite article "a" was omitted before the words "true bill," the indorsement being "true bill" instead of "a true bill," it was held not a fatal omission.⁶ In some States, besides a signature, there must appear the official character after the name. In a bill of indictment indorsed "a true bill," and to the subscription A. B., the foreman, the letters F. G. J. were added, they were held sufficient to indicate that he acted as foreman, it appearing from the record that A. B.

¹ *Shattuck v. State*, 11 Ind. 473. In *United States v. Reed*, 2 Blatch. C. C. 435, it is said to be the uniform practice in the federal and state courts for the clerk and assistant of the district attorney to attend the grand jury and assist in investigating the accusations presented before them. This right is provided for by statute in New York; but he is forbidden to be present during the expression of their opinion, or the giving of their votes upon any matter before them. 2 Rev. St. 725, § 33. The defendant has no right to an attorney before the grand jury. 1 Barn. & Cress. 37; 10 Ibid. 237. In California the district attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses, whenever they think, or he thinks necessary. Penal Code, § 925. It is legal and proper for the government attorney to be present and confer with the grand jury during their deliberations, whenever he deems it necessary. Ex parte Crittenden, 1 Hemp. 176.

² *Lung's case*, 1 Conn. 428.

³ *Commonwealth v. Sargent*, Thacher's Crim. Cases, 116; *State v. Davidson*, 12 Vt. 300; *State v. Elkins*, Meigs, 109; *Gardner v. People*, 3 Scam. 83.

⁴ *State v. Taggart*, 38 Maine, 298.

⁵ *Webster's case*, 5 Greenleaf, 432.

⁶ *State v. Davidson*, 12 Vt. 300.

was in fact the foreman of the grand jury when the bill was found.¹

A variance between the name of the foreman as appearing upon the record of his appointment and his signature upon the bill is immaterial, for his identity must necessarily be known to the court;² and an indorsement by the foreman of the grand jury, where the record of the appointment states his name at full length, is not a material variance.³ In North and South Carolina the indictment need not be signed by the foreman; it has even been held in the former State that it need not be signed by any one; it is the returning of the bill or the indictment publicly in open court, and its being there recorded, that makes it effectual.⁴

In Mississippi, where the indictment was indorsed a true bill by one of the body, and it was shown independently of this indorsement that it was returned by the whole authority of the fifteen jurors who composed the panel, it was held good though not signed by the foreman;⁵ but it is there held that the statute requiring the signature of the foreman of the grand jury on each indictment is merely directory.⁶

The signature of the foreman of the grand jury to an indictment certifying it to be a true bill, imports that it was found by twelve or more grand jurors.⁷

It has been held in Georgia that the foreman need not sign the indorsement and return of "true bill" upon an indictment, it not having been required at common law, and the statute being silent on the subject; but the Supreme Court of that State recommends that the practice be observed.⁸

¹ State v. Chandler, 2 Hawks, 429.

² State v. Calhoon, 1 Dev. & Bat. 374; State v. Stadman, 7 Porter, 495.

³ State v. Collins, 3 Dev. 117.

⁴ State v. Creighton, 1 Nott & McCord, 257; State v. Cox, 6 Ired. 44.

⁵ Friar v. State, 3 How. 422.

⁶ State v. Martens, 14 Miss. 94.

⁷ Turns v. Commonwealth, 6 Met. 224.

⁸ McGuffie v. State, 17 Geo. 497. The mode in which the grand jury formerly returned bills was by indorsing on the back of the bill if rejected, "*ignoramus*," and hence the expression is used that they *ignored* the bill; which intimated there was not complete evidence adduced to put a person on trial; but if found to be true, it was marked "*billa vera*," or if there were several returned at the same time, *quod separales presentes sunt billas veras* (Com. Dig. Indictment, A.), and it was held that if the indorsement was "*quæ est billa vera*" instead of "*quod est*," the finding was defective. 8 Mod. 296. However, at the present time, the in-

§ 59. The return of an indictment into court, after finding, is necessary to its validity, and it should be returned in the presence of the jury.¹ Before a party can be tried, it must appear that the indictment was returned by the grand jury in open court; and such a fact not appearing, a motion in arrest of judgment should be allowed. Although the minutes of the judge show the indictment to have been so returned, this does not have the force or effect of a record;² and where the record fails to show that the indictment was returned by the grand jury, and it appears not to have been signed by the district attorney, it will be quashed on motion.³

Where it appeared by the record that a foreman was appointed, and that the indictment was returned signed by him, and the caption stated that the grand jury returned the bill into court by their foreman, it was held sufficient evidence that the bill was returned by authority of the grand jury.⁴

In Massachusetts no indictment is allowed to be filed in court and to become matter of record unless it is brought into court by the grand jurors in a body, and delivered to the court by their foreman, by whose signature it is verified.⁵

This formality is made necessary, so that if any mistake be made it may be corrected by the court before the discharge of the jury.⁶

indorsement is in English absolutely; if the charge be found, it is marked "a true bill," if rejected, "not a true bill," or, which is the better way, "not found," in which case the party is discharged without further answer. 4 Bl. Com. 309.

The statutes of our different States have generally specific directions as to the manner of signing an indictment. Thus in California (Penal Code, § 940) the indorsement "a true bill" must be signed by the foreman. The same in New York. 2 Rev. St. 726, § 36. Where the statutes are silent on the matter, the form according to the common law will be adopted as above stated. If an indictment is not signed by the foreman of the grand jury, the defendant must take advantage by motion to set it aside; if he goes to trial on a plea of not guilty he waives the defect. *People v. Johnston*, 48 Cal. 549. An indictment for murder will not be quashed on the ground that in the signature of the foreman of the grand jury his christian name was re-signed by the initial letter only. *Commonwealth v. Gleason*, 110 Mass. 66.

¹ *Chitty Crim. Law*, 324; 4 Bl. Com. 306; *State v. Squire*, 10 N. Hamp. 558.

² *Sattler v. People*, 59 Ill. 68.

³ *Heacock v. State*, 42 Ind. 393.

⁴ *Greeson v. State*, 5 How. (Miss.) 33; *Peter v. State* 3 Ibid. 433.

⁵ *Commonwealth v. Johnson*, Thach. Crim. Cas. 284.

⁶ 2 *Strange*, 1026; 1 *Chitt. Crim. L.* 324. In Michigan, New York, and Arkansas the statutes provide that indictments found by a grand jury shall be pre-

§ 60. The amendment of the indictment after its return and filing cannot be permitted. So careful is the law of any tampering with an instrument of so important a character, that when it has been received from the grand jury, and filed, there is no power thereafter to alter the record. But in a very early case an amendment was allowed;¹ for the reason that it had not yet been entered, and the court held that before judgment, while the filing had been perfected, they had power over all proceedings.

Formerly where an indictment appeared to be insufficient, the practice was, not to put the defendant to answer it, but, if it were found in the county in which the court sat, to summon the grand jury into court to amend it, and it is the common practice at this day, while the grand jury which found a bill is before the court, to amend it by their consent, in matter of form, as the name or addition of a party.²

Upon principle as well as upon the current of authorities, it appears that no indictment can be amended without the consent of the jurors who act as accusers.³

It has been held in Massachusetts that the indictment for a capital offence cannot be amended even with the prisoner's consent;⁴ and if a count be stricken out or quashed it will vitiate the whole indictment.⁵ Thus if an indictment be not signed by the foreman, his signature cannot afterwards be affixed.⁶

It is said that the caption of an inquisition shall never be amended after it is filed; for being part of, and drawn at the same time with the inquisition, greater exactness is required in

sent by their foreman in their presence to the court and shall there be filed and remain as public records. Rev. St. Mich. c. 164; 2 N. Y. Rev. St. 726, § 38; Rev. St. Ark. c. 52, § 85. There is a similar statute in Iowa. Code, Iowa, § 2914. And such is the law in California. Penal Code, § 932. In Tennessee the record must show that an indictment found by the grand jury and indorsed by the foreman as a true bill was returned into court, or the conviction cannot stand. *Chappel v. State*, 8 Yerg. 166. See, further, *Rainey v. People*, 8 Ill. 71; *Kelly v. People*, 39 Ill. 157; *Jenkins v. State*, 30 Miss. 408.

¹ *Rex v. Knowles*, 1 Salk. 47.

² 2 Hawk. P. C. c. 25, § 98.

³ *Finch v. State*, 6 Blackf. 533; *Commonwealth v. Adock*, 8 Cratt. 661; *State v. Durbin*, 20 La. Ann. 408.

⁴ *Commonwealth v. Mahar*, 16 Pick. 120.

⁵ *May v. State*, Minor, 28.

⁶ *State v. Squire*, 10 N. Hamp. 558.

it than in the caption of an indictment, which is left, as of course, to be drawn up as occasion shall require.¹

It is laid down by Hale, that if the caption of an indictment be faulty in form, yet at the same term it may be amended by the clerk of the assizes, or the peace, but not in another term.²

In South Carolina it has been held that the caption being no part of the indictment, but only the style or preamble, it may be amended on motion, so as to make it agree with the original record, at any time during the term at which it was found; consequently a material error in the caption is not a fatal objection in arrest of judgment;³ and in the same State, where the caption was defective in not stating that it was found at a special court, the court gave leave to amend after conviction.⁴

In Pennsylvania defects in the caption, as not naming the judges, the jurors, or the county, which would be fatal, if the indictment were returned into a superior court, may be supplied in the court in which it is taken, by reference to other records there.⁵

However, it is only when the caption can be amended in some informality, or by a comparison with some part of the record of the indictment, that an amendment is permitted. Amendment of any matter that would give the accused a right to make a motion to quash the indictment cannot be permitted after it is filed, as then it becomes part of the record.⁶

§ 61. Discharge of Grand Jury. — It is usual for the grand jury to serve during the term of the court for which it is summoned. "The grand inquest returned the first day of the sessions of the peace, and sworn, commonly serves the whole sessions, oyer and terminer, or gaol delivery; yet the court may command another grand inquest to be returned and

¹ 2 Hawk. P. C. c. 25, § 97.

² 2 Hale P. C. 168; 8 Coke, 156, 157; 2 Ld. Raym. 968; 1 Vent. 344.

³ State v. Creight, 1 Brev. 169.

⁴ State v. Williams, 2 McCord, 301. See Commonwealth v. James, 1 Pick. 375; Burgess v. Commonwealth, 2 Virg. Cas. 483.

⁵ Pennsylvania v. Bell, Add. 173.

⁶ The subject of amendment is now to a great extent regulated by statute. In England, by 7 Geo. IV. c. 64. In Massachusetts, Rev. Stat. c. 130, § 14. In New York, 2 Rev. Stat. p. 730. In Pennsylvania, Rev. Act, 1860, p. 434. In Virginia, Rev. Code, 1866, c. 107, § 11.

sworn, which is done ordinarily on two occasions ;"¹ and then Hale proceeds to describe the two occasions when this is done, namely, when a crime is committed after the discharge of the jury, and when a jury is summoned to inquire as to concealments by a previous grand jury.

There are occasions when, after a formal discharge, a grand jury not quite dismissed from the presence of the court may be called back again to act upon a charge. Thus, where the grand jury had been discharged and left the court, but had not left the building nor separated, the judges directed them to be sent back into court, and directed another bill of indictment (the witnesses on which were going abroad) to be sent before them.²

In Michigan, although the grand jury have finished their business, and been dismissed before the adjournment of the court, yet they may under the Revised Statutes be re-summoned, at any time during their term, to inquire into an offence committed after their discharge; and it is held that jurors originally summoned, but who did not attend with their fellows before they were dismissed, may also be re-summoned, and, on being sworn, and impanelled, may act with them thereafter.³

II. CORONER'S JURY.

§ 62. Its History. — The coroner's jury is found at a very remote period in English history, with larger and more responsible powers than it possesses at present.⁴ It had in early times powers somewhat similar, almost coextensive with an accusing jury, therefore it performed like functions with a grand jury. The name is derived from the fact that formerly coroners were empowered to hold pleas of the crown — *placitæ coronæ*;⁵ but they were deprived of this power by the seventeenth chapter of the Great Charter. From the allusions to the coroner by early English writers, we perceive that he

¹ 2 Hale P. C. 156.

² Rex v. Holloway, 9 C. & P. 43.

³ Findley v. People, 1 Mann. 234.

⁴ It is said its commencement is unknown. 3. Bulstrode, 176.

⁵ 4 Inst. 471.

must have been an officer of considerable dignity and importance in the county.¹

The earliest statute regulating and defining a coroner's duties is in the time of Edward I., and is entitled *De officio Coronatoris*, which enumerates the matters requiring his investigation, and the mode of taking the inquiry.

From this statute we learn that the jurors were to be summoned from the nearest townships; but it is not there declared how many were to be summoned, and it is thought at this time the number was not fixed. However, in time, from the analogy to the number required on a trial jury, it became a rule that twelve must concur in the finding. If twelve did not agree, there was a pressure put upon them, in being kept without meat, drink, or fire, until a verdict was obtained; it being supposed that physical wants of this kind would soon stifle any mental scruples, or hesitation. "Formerly if they refused to make a legal presentment, it was the custom for the coroner to adjourn them from place to place; but it was said by Chief Justice Holt that it was wrong, and that they ought to be adjourned to the azzises, 'where the judge will inform them better.'"²

Who are entitled to be put upon the inquest, is laid down by Hawkins, who says it is sufficient if they be lawful persons of the county.³

§ 63. The number required to form a coroner's jury in the common law must be at least twelve, and twelve must agree in the verdict.⁴

In our States, the number varies from three to twelve. In New Hampshire three only are summoned, one of whom is to be a justice of the peace.⁵ In Massachusetts six are summoned, and if six do not attend, the coroner is to summon

¹ Thus Chaucer mentions him in his description of the Frankelcin : —

At sessions there was he, lord and sire
Full often time he was knight of the shire
A shereve had he been, and a coronour
Was no where swiche a worthy vavasour.

² Forsyth, *Trial by Jury*, p. 188.

³ 2 Hawk. c. 9, § 12.

⁴ *Lambert v. Taylor*, 6 D. & R. 196.

⁵ Gen. Stat. p. 499.

from the bystanders enough to make up that number.¹ In New York not more than twenty-three or less than sixteen are to be summoned, and twelve are to be sworn on the inquest.² In California the coroner is to summon not less than nine or more than fifteen, and six at least are to be sworn on the inquest.³

In Michigan the inquest is held by justices of the peace, and the number composing it must not be less than six nor more than twelve;⁴ and also in Wisconsin the justices of the peace hold the inquest, and six are summoned and sworn.⁵ In Mississippi six are required on the inquest.⁶ In Indiana fifteen are summoned, and twelve required to be sworn.⁷ In Connecticut inquests are held by justices of the peace, and twelve are summoned and sworn.⁸ In South Carolina fourteen are summoned, and twelve sworn on the inquest.⁹ It was said in an English case, that after verdict the court will presume that a coroner's inquisition was found by twelve jurors, if twelve were necessary.¹⁰

§ 64. *Nature of the Inquest.* — The coroner, after the jury is sworn, is required to charge them to make inquiry upon view of the body how the party came by his death, whether by murder by any person, or by accident, or whether by suicide.¹¹ The view must take place by the jury and coroner at the same time; and if the body cannot be viewed he can do nothing; because the manner of death, the place, length, and depth of the wound ought to be ascertained;¹² and to enable the jury to discharge these duties, the coroner should have the body ex-

¹ Gen. Stat. p. 848.

² 2 Rev. Stat. 742.

³ Penal Code, §§ 1510, 1511.

⁴ 2 Rev. Stat. 2182.

⁵ 2 Rev. Stat. 1966.

⁶ Rev. Code, c. 3, § 244.

⁷ 2 Rev. St. (1852) p. 14.

⁸ Gen. St. (1866) p. 124.

⁹ Rev. Stat. 752.

¹⁰ *Taylor v. Lambe*, 4 B. & C. 138.

¹¹ 2 Hale P. C. 60.

¹² *Reg. v. Brownlow*, 11 Ad. & E. 119; *Rex v. Farrand*, 1 Chitt. R. 745; 2 Hale P. C. 58; *Rex v. Evett*, 6 B. & C. 267.

hured, if not too long buried. It was decided that it was too late to take up the body seven months after death.¹

It is not necessary that the jurors should be sworn *super visum corporis*, or that they should all be sworn at one time, or that they should all view the body at the same time.²

It is held that in holding an inquest, a coroner is performing functions of a judicial character, and this will necessitate a careful examination of the facts and testimony.³ Hence, Hale says that he must hear the evidence of all hands; because it is not so much an accusation as an indictment, because the party may be arraigned on it.⁴ And he ought to inquire into all the circumstances of the party's death, and all things which occasioned it.⁵ As the inquiry is deemed to be judicial in its character, it was decided that it was not subject to revision by a board of county commissioners.⁶

In a case of a man who drowned himself, the coroner on the inquest refused to receive evidence of witnesses to prove him *non compos mentis*, and for this he was reprimanded by the court; upon which Hale remarks: "So that I do conceive the coroner's inquest ought in all cases to hear the evidence upon oath as well that which maketh for as that which maketh against the prisoner, and the whole evidence ought to be returned with the inquisition."⁷

And evidence of material facts from parties ought not to be excluded on the ground that it would criminate them.⁸

§ 65. Duty of Coroner.—It is the duty of the coroner, whenever information is given him as to the sudden death of

¹ Rex v. Bond, 1 Stra. 22.

² Reg. v. Ingham, 5 B. & S. 257.

³ People v. Devine, 44 Cal. 452; Young v. Commonwealth, 6 Binn. 93; Padlock v. Cameron, 8 Cow. 212; Rex v. Scorey, 1 Leach C. C. 43.

⁴ 2 Hale P. C. 157; 2 Sid. 90, 101.

⁵ 2 Hawk. c. 9, § 28.

⁶ Boisligniere v. Board Co. Commrs. 32 Mo. 375.

⁷ 2 Hale P. C. 62.

⁸ Wakely v. Cooke, 4 Ex. 511. In Supreme Court, Pennsylvania, the coroner in every case of homicide, it was held, should make a post mortem medical examination, and that the county was bound for the expense of such proceedings, and this without statutory provisions. Commonwealth v. Harman, 4 Barr, 269. It was so decided in Indiana. Gaston v. Board Commrs. 3 Ind. 497. In England the coroner should examine a surgeon in case of death in a pugilistic encounter. Rex v. Quinch, 4 C. & P. 571.

a person, to forthwith summon a jury, to make inquiry into the circumstances by which the person met his death, and a refusal and neglect of this duty by the coroner will subject him to fine and imprisonment;¹ and it becomes the duty, subject to a penalty if neglected, of persons to summon the coroner for this purpose. There was a singular rule of law with regard to the death of a person in gaol; for a presumption arose, that such a one met his death by the duress of the gaoler, and he was then bound to summon the coroner to take an inquest.²

As in many places the coroner is allowed fees for his services, it would follow that the instances in which he would neglect to attend to his duties would be rare, and that it would more frequently happen his services would be rendered where the case did not call for them; and it was held that the coroner ought not, in general, where a party dies by the visitation of God, nor in any case, unless a very doubtful one, unnecessarily obtrude himself into private families for the purpose of instituting an inquest.³

It is his duty to return the inquisition, with the evidence signed by each of the jurors and himself, to the proper authorities; for if not so signed, the inquisition is bad, and will be set aside;⁴ and where some of the jurymen signed by their marks, and their marks were not attested, the inquisition was held bad on that ground.⁵

Before signing by the witnesses, it is the coroner's duty to read over the evidence to them.⁶

The coroner is bound to deliver personal property to the true owner, on demand, when found on the body of the dead; though usually property found is delivered over for safe keeping to the proper authorities.⁷

§ 66. Power of Coroner. — The coroner is given power to summon a jury, and, for that purpose, is invested with the

¹ 2 Hale P. C. 58.

² 3 Inst. 52, 91.

³ Rex v. Justices of Kent, 11 East, 229.

⁴ Rex v. Bowen, 3 C. & P. 602; Rex v. Norfolk, 1 East P. C. 383.

⁵ Reg. v. Stockdale, 8 Dowl. P. C. 517. The jurors need not sign in full, if their names are recited in the inquest. Rex v. Bennett, 6 C. & P. 179.

⁶ Rex v. Plummer, 3 C. & P. 49.

⁷ Smiley v. Allen, 6 Pick. 70.

necessary authority, independently of any statutory enactment to punish for non-attendance; because it would be absurd to give the coroner the power of summoning an inquest, unless it is understood that all the incidental means of rendering that power efficient were not also at the same time delegated to him.¹

He has power to exclude parties from the room having no interest in the inquest, and no action can be brought for so expelling them.²

He is also given the power to summon witnesses, and to fine them for non-attendance; for the very same reason as stated above in the case of jurors. In England, by statute 7 & 8 Vict. c. 92, coroners are now empowered to fine non-attending witnesses and jurors not exceeding forty shillings. And by the New York statutes,³ "Every person served with a subpoena shall be liable to the same penalties for disobedience thereto, and his attendance may be enforced in like manner as upon subpoenas issued in the justices' courts."

The same power must necessarily be given by statute in the various States; or if not expressly conferred must be necessarily inherent in the coroner to effectually carry out the duties intrusted to him by law.

He has power, and it is expressly given in statutes, to issue warrants for the arrest and examination of accused parties in the same manner as justices of the peace.

When a coroner has taken an inquest *super visum corporis*, he cannot again take a second inquest, unless the former was quashed.⁴ Thus, when on a coroner's inquest the jury found that the death was caused by suicide, and nearly four months afterwards the coroner summoned another jury and held a second inquest, at which the jury found the deceased was killed by H. B., whereupon the coroner issued a warrant of commitment under which he was imprisoned; on *habeas corpus* he was discharged, on the ground that the second inquest was unauthorized.⁵

¹ Ex parte McAnnulty, Charl. 310.

² Garnett v. Ferrand, 6 B. & C. 611.

³ 2 Rev. Stat. 743; Cal. Penal Code, § 1513.

⁴ 2 Hale P. C. 59; People v. Budge, 4 Park. Cr. R. 519.

⁵ People v. Sanchez, 4 Park. Cr. R. 535.

§ 67. *Witnesses before Coroner's Jury.* — It has been mentioned that the coroner is invested with the power to issue subpoenas for the attendance of witnesses, and to punish them for non-attendance. Such witnesses are not entitled to fees, as are witnesses in other cases.¹ A prisoner has no right to summon witnesses, nor a right to cross-examine witnesses before the coroner. And the coroner need not take the testimony of witnesses in the presence of the accused.²

If the verdict be of that description that future proceedings will be necessary, the coroner is to bind over all proper persons to prosecute and give evidence;³ but he is only to bind over those in support of the case against the party.⁴

The evidence of witnesses before a coroner's jury is held privileged, and it is not allowable to publish it. It has been so held in England.⁵ In *Rex v. Fleet*, Bayley, J., said, the reason was, that "the inquest before the coroner leads to a second inquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment of the case. . . . It is therefore highly criminal to publish before such trial, an account of what has passed on the inquest before the coroner."

§ 68. *Effect of the Inquest.* — The effect of the inquest as far as an accused is concerned is to put him on his trial; he can be arraigned on it, without an indictment;⁶ but the grand jury may also find an indictment. Thus, in a case in New York, it was held the grand jury may find a bill against parties who are under arrest on a coroner's warrant, after the coroner's jury has returned an inquest implicating them, and before the examination of the coroner has been completed.⁷

It is said the finding of a grand jury is of more weight than a coroner's inquest. Thus, in the case of *Rex v. Dalton*,⁸ the de-

¹ *Alleghany Co. v. Watts*, 3 Barr, 464.

² *People v. Collins*, 20 How. Pr. 111. In *Rex v. Scorey* (1 Leach C. C. 43), it was held the coroner should receive evidence on the part of the person accused.

³ Umfr. on Coron. 188.

⁴ *Reg. v. Taylor*, 9 C. & P. 672.

⁵ *Rex v. Fisher*, 2 Camp. 563; *Rex v. Fleet*, 1 B. & Ald. 379.

⁶ 2 Hale P. C. 61.

⁷ *People v. Hyler*, 2 Park. Cr. R. 566.

⁸ 2 Stra. 911.

fendant was committed for manslaughter for killing his school-fellow at Eton, and it was prayed that he might be bailed. The chief justice said, if the depositions made it murder, he would not admit to bail, but if they amounted only to manslaughter, he would, though the coroner's inquest had found it murder. And he said the distinction was, that the court can look into the depositions at a coroner's inquest; but cannot examine the evidence in the case of an indictment, as the proceedings are taken to be secret.

If there be a defect or error on the face of the inquisition, the court will quash it; but it will not be quashed on the mere ground that the coroner misdirected the jury.¹

Formerly an important inquiry occurred as to the effect of a coroner's inquest in a case of *felo de se*; because it was a rule to forfeit the goods of the deceased to the king. And the question was, as to how far it was permitted to traverse an inquest which found that a person had committed suicide. Coke holds that an inquest of this kind is conclusive, and is not traversable; but against this is the opinion of Bacon,² who holds it can be traversed, and this is supported by the authorities.³ It is held that its conclusiveness can be denied by the executors or administrators of the deceased.⁴ But no traverse can be taken to *make* a man *felo de se*, as if the inquisition finds that the party was *non compos mentis* at the time of the act, the king or his grantee cannot traverse it.⁵

III. SHERIFF'S JURY.

§ 69. When allowed. — It is not intended in the present work to treat of the sheriff's jury to any extent, but merely incidentally to enumerate it among the several kinds of juries known to the law. In a work of a general nature it would not be practicable to consider it at length, as it is regulated in each State by special statutes and practice, to which reference must necessarily be made. Hence we shall only indicate in a general way the several purposes for which such a jury is formed.

¹ Reg. v. McIntosh, 32 L. T. Q. B. 146.

² 3 Inst. 55; Abr. Coron. (D); 2 Burn, 43.

³ Rex v. Parker, 3 Keb. 489; 1 Hale P. C. 416.

⁴ 1 Vent. 239.

⁵ 1 Ibid.

Blackstone says it is a jury composed of no determinate number, but which may be more or less than twelve, summoned by the sheriff for the purposes of an inquisition or inquest of office.¹ In general, the purposes for which it is assembled are to estimate the amount of damages, the amount of a judgment after its rendition where that depends upon certain inquiries to be made, to inquire into a person's sanity, and for trying a claim to property when found in another's possession on a levy made by the sheriff. When it was required to make an estimate of the amount of damages, the order summoning the jury was known as a writ of inquiry, which is thus defined: "A judicial writ that issues out to the sheriff upon a judgment by default, in action on the case, covenant, trespass, trover, &c., commanding him to summon a jury to inquire what damages the plaintiff hath sustained *occasione præmissorum*." ²

Its purpose is said to be to inform the conscience of the court as to the amount at which the damages should be assessed.

It is required in some places for the purpose of estimating the value of the improvements, the damages, the net annual value of rents and profits, and the value of the land, when a tenant is evicted who has been in possession of land for some time and made improvements, as in Ohio.³

In New York, when land is to be taken for the use of the State, on application made to the court, a writ of inquiry is directed to the sheriff to summon twelve lawful men, who on their oaths are required to assess the damages occasioned by the appropriation of such land on behalf of the State.⁴

In many States, when land is required for the use of a corporation, it is provided that the damages are to be assessed by a jury. This is the case in Maine, and two late decisions in that State have established the principles on which an assessment for such damages are to be made. It was there held that

¹ 3 Bl. Com. 258.

² Tidd, 314.

³ Gwynne on Sheriffs, p. 421. In a suit for the value of such improvements, the case must be submitted to a jury in a court of the United States, if more than twenty dollars is claimed. *Hamilton v. Dudley*, 2 Peters, 524.

⁴ 2 Rev. Stat. 589. It is not requisite for the sheriff of the city and county of New York on a writ of inquiry to summon only such persons as the commissioners of jurors may have selected to serve, or may designate. *Jennings v. Astor*, 5 Duer, 695.

the jury should estimate the depreciation of the adjoining lots, when a lot was crossed by a railroad, from the noise of the whistle, the sparks of the locomotive, and the noise occasioned by the passage of trains ; and that consequential damages based on these considerations by a jury would not be set aside by the court.¹

§ 70. *How constituted.* — The number constituting such a jury is not uniform ; as a rule it varies from six to twelve ; but in Ohio on an inquest of lunacy, the sheriff is commanded to summon *five* discreet disinterested freeholders of the county, provided they do not reside in the same township as the lunatic ;² but on an inquest to determine the value of improvements, &c., on the eviction of a tenant, twelve are to be summoned, and are to be drawn from the jury box of the county.³

In New York, on a jury to determine the value of land taken by the State, twelve are required to be drawn from the qualified jurors of the county.⁴ In Maine, according to the decisions quoted in the last section, the sheriff is not bound to select them as other jurors are selected, and there is no right of challenge allowed.⁵ As a general rule, the persons selected to serve on a sheriff's jury must be legally qualified to serve as jurors generally. In some places the right of selection is given to the sheriff without any check as in Ohio, where if the five summoned on an inquest of lunacy fail to appear, the sheriff summons others at his discretion who have the same qualification.

The number required generally on a writ of inquiry to assess the amount of damages is twelve, as it was in the common law ; in States where a jury is called to determine a claim to property when seized by the sheriff, six is the usual number as in New York and California.⁶

¹ Bangor, &c. R. R. Co. v. McComb, 60 Maine, 290 ; Davis v. Bangor, &c. R. R. Co. 60 Ibid. 303.

² Gwynne on Sheriffs, p. 548.

³ Ibid. p. 421.

⁴ 2 Rev. Stat. 589.

⁵ The statutory provisions for impanelling an ordinary jury do not apply to that of a sheriff's jury. Davis v. Bangor, &c. R. R. Co. 60 Maine, 303.

⁶ Voorhis' Code (N. Y.), p. 641 ; Code of Proced. (Cal.) § 689.

IV. A SPECIAL OR STRUCK JURY.

§ 71. History. — In the trial of certain questions requiring special knowledge, or very careful examination, and involving weighty and important interests, there has been established a practice of selecting a more particular body of men as jurors than those ordinarily called to serve upon juries.

When this practice was first established is uncertain; but it is obvious from the allusions to such a jury in cases and in statutes that a special jury has been known in law for a very long period. It is stated in *Rex v. Edmonds*,¹ “that it cannot be ascertained at what time the practice of appointing special juries for trials at *nisi prius* first began, but that it probably arose out of the custom of appointing jurors for trials at the bar of the courts at Westminster, and was introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office.” It is certain this kind of jury was known in the time of William III., for in the eighth year of that reign it was held that “when the master is to strike a jury, viz, forty-eight out of the freeholders’ book, he shall give notice to the attorneys of both sides to be present, and if one comes and the other does not, he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out the other twelve for him that is absent.”² From this it appears that the practice was an old and familiar one.

Bentham finds this kind of jury particularly obnoxious; for he says in reference to it:³ “As of the *true* and *original* jury, so of this *imposturous* modern substitute; the origin lies buried in obscurity. Human craft in every shape, and in particular in the shape of *lawyer craft*, — human craft, like the *mole*, hides its ways from the light of day, and as completely as possible from human eyes.” He mentions in a note that in the oldest book of practice in existence, Powell’s Attorney’s Academy (1623), there is no mention of a special jury. The first mention of such a jury in a statute, is in the year 1730, in the statute 3 Geo. II. c. 25, but that statute merely regulates the

¹ 4 Barn. & Al. 477.

² 1 Salk. 405.

³ Art of Packing Juries, p. 26.

mode, and speaks of the jury as already in existence and well known.

§ 72. *When ordered.* — Speaking of special juries, Blackstone says, they “were originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.”¹ By the statute 3 Geo. II. c. 25, such jury was on motion to be ordered in trials for “any indictment or information for any misdemeanor, or information in the nature of a *quo warranto*,” and in “any cause or suit whatsoever, depending or to be brought or carried on in said courts,” therein mentioned; and the parties applying for the special jury were required to pay the fees for the same without being allowed them as taxed costs.

A motion for a struck jury is made to the discretion of the court; and it is evident that certain reasons or circumstances must be presented by a party who makes a motion for the impanelling of such a jury. Blackstone gives two circumstances, as justifying the appointment of a special jury. First, where the cause is of too great nicety for the discussion of ordinary freeholders; and secondly, where the sheriff is suspected of partiality.² The New York statute substantially allows a special jury to be struck in like circumstances, namely, when an impartial trial cannot be had without a struck jury, and when the importance and intricacy of the cause requires such a jury.³ In Michigan the statute reads, that “when it shall appear to the circuit court that a fair and impartial trial will be more likely to be obtained in any cause pending therein,” the court shall order a special jury.⁴ In other States, it seems to be a matter of right given to either party, on paying the fees. Thus, in Pennsylvania no conditions are laid down,⁵ and the same in Ohio.⁶

¹ 3 Bl. Com. 357.

² This was the occasion of the appointment of a special jury in *Pacheco v. Hunsacker*, 14 Cal. 120.

³ 2 Rev. Stat. 418.

⁴ Compiled Laws, vol. 2, p. 1724.

⁵ Dunlop's Laws, p. 147.

⁶ 1 Rev. St. 758.

In those States which require certain facts to be shown to the court before an order for a special jury is granted, it must appear that the facts fully warrant such an order, as it was said in *Patchin v. Sands*,¹ that a struck jury will not be granted but in extreme cases. In New Jersey the court must be satisfied by affidavit or affidavits that the nature and importance of the matter or matters in controversy in such suit or action, renders it reasonable and proper that the order should be made.²

The affidavit presented on a motion should specify wherein the importance or intricacy of the case consists.³

It is a general rule, if the cause affects the public, and is important in its consequences, a struck jury will be allowed;⁴ and it has been allowed in the case of a libel against a public officer, or an officer of the court;⁵ but it will not be allowed in an action for a libel on a public officer unless it relate to his official conduct.⁶ Nor will it be ordered to try a question of title to the office of justice of a district court in New York.⁷ The amount in controversy is not alone sufficient for the allowance of a struck jury.⁸

By the terms of the statute of 3 Geo. II., it is seen that a special jury can be ordered in a criminal as well as in a civil suit; and this is held under our statutes.⁹

§ 73. **Selection and Formation.** — The mode in which the special jury was selected is given by Blackstone thus: "He," the sheriff, "is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book, and the officer is to take indifferently forty-eight of the principal freeholders¹⁰ in the pres-

¹ 10 Wend. 570. In Missouri, the court at its discretion may order a special jury to try a cause. *Union Savings Bank v. Edwards*, 47 Mo. 445.

² Nixon's Dig. 453.

³ *Manhattan Co. v. Lydig*, 2 Caines, 380.

⁴ *New Windsor Turnpike Co. v. Ellison*, 1 Johns. 141.

⁵ *Thomas v. Rumsey*, 4 Johns. 482; *Spencer v. Sampson*, 1 Caines, 498.

⁶ *Thomas v. Crosswell*, 4 Johns. 491.

⁷ *People v. McGuire*, 43 How. Pr. 67.

⁸ *Wright v. Columbian Ins. Co.* 2 Johns. 211.

⁹ *Sutton v. State*, 9 Ohio, 133; *State v. Murat*, 4 Halst. 3.

¹⁰ By 6 Geo. IV. c. 50, the qualification for special jurors is the description of the parties in the jurors' book as esquires or persons of higher degree, or as bankers or merchants.

ence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel."¹ The mode adopted in New York is substantially adhered to elsewhere. This is as follows: Eight days' notice is required to be given by the party obtaining the order, of the attendance before the county clerk for striking the jury. The clerk, at the time appointed, in the presence of the parties, or their counsel, draws from the lists of jurors' names forty-eight indifferent persons. The party obtaining the order strikes off one first, then the opposite party another, and so on, alternately, until each party shall have stricken out twelve names, leaving twenty-four, which are then certified by the clerk to the sheriff, who is then required to summon the persons, whose names are so delivered, as other jurors are summoned.²

In case of a deficiency in the number thus summoned to form the special jury, the important question arises, how this deficiency shall be supplied, whether by drawing other names, or summoning talesmen as in other cases. It is evident that certain contingencies may arise, which may bring about such a deficiency, and some means must be adopted to supply it. It was contended in the case of the special jury summoned on Tweed's trial, that no talesmen could be summoned, but Westbrook, J., held that this was the proper way to supply the deficiency.³ This is undoubtedly conformable to the practice in England from a very early date, as in *Sparrow v. Turner*,⁴ in the eighth year of Geo. III., it was held that either party in case of a deficiency might have asked for a *tales*. The same was held in a subsequent case, *Rex v. Perry*,⁵ and the rule is well established in later cases.⁶ In a case in Pennsylvania, it was also decided that a *tales de circumstantibus* would be ordered to supply a deficiency in the panel of a struck jury.⁷

¹ 3 Bl. Com. 358.

² 2 Rev. Stat. 418.

³ Daily Register (N. Y.), Jan. 19, 1876.

⁴ 2 Wils. 366.

⁵ 5 Term R. 453.

⁶ *Gatliff v. Bourne*, 2 M. & Rob. 100; *Wood v. Thompson*, 5 Jur. 708; *Rex v. Dolby*, 2 B. & C. 104.

⁷ *Atlee v. Shaw*, 4 Yeates, 236. Talesman can be supplied in Ohio. *Cleveland, &c. R. R. Co. v. Stanley*, 7 Ohio St. 155.

It was held at an early period in the United States Circuit Court, in Pennsylvania, that a *tales* can be had in a special jury case. Peters, J., said, "I have no doubt of the power of the court to order a *tales* in special jury causes. . . . Unquestionably it may be done under the act of Congress."¹

To remove any doubt as to the manner of supplying such a deficiency, the statutes of Minnesota have provided for summoning talesmen as in other cases.² There, forty are only drawn from the jury lists, and after the numbers are struck, there remain sixteen to be summoned.

In Indiana,³ forty are also drawn by the clerk, and the sixteen remaining, after twenty-four are struck off, are summoned by the sheriff. It is there provided that unless at least one half of such struck jury shall be in attendance at the trial, the case shall be tried by the regular petit jury.

§ 74. **Effect of Mistakes or Omission of Names.**—The limited number summoned, and the strict nature of the proceedings, require that there shall be a faithful compliance with the directions in the statute as to the mode of summoning and selecting a special jury. Hence it becomes the strict duty of the officials intrusted with the duty of selecting and summoning, to see that the names, character, and qualifications of the jurors are correctly ascertained; for a mistake or an omission may be fatal to the whole proceedings. Thus, on the trial of a special jury cause, before the verdict, it was found that a person had been impanelled on the jury who answered to another's name by mistake, and the defendant objected to take the verdict on this ground, but the plaintiff insisted and took a verdict, it was held fatal, and a *venire de novo* was granted.⁴

When R., the elder, was summoned on a special jury, and R., the younger, was sworn and sat as one of such jury, he not being qualified to sit either on a special or a common jury, it was held that as the clerk of the defendant's attorney was present at the trial and knew of the mistake, and no affidavit of

¹ 2 Dallas, 38

² 2 Bissell's Stat. p. 836.

³ Act March 9, 1861.

⁴ Doe d. Ashburnham (Earl) v. Michael, 16 Q. B. 320.

the attorney that he was ignorant being produced, a new trial should not be granted.¹

An important decision was made in Tweed's trial on just such a point, in regard to the wrong writing of a name on the panel. For when the name of George W. Southwick was on the original number of forty-eight taken from the jury list, and after striking there was summoned twenty-four, including one John C. Southwick, whose name was not on the original list, but was taken for the other name, George W., and it being made to appear that there were two persons answering to these names, it was held by Westbrook, J., that the mistake was a fatal one, and could not be amended.² But in another instance, where the name on the list selected and summoned was Julius W. Catlin, while the name on the general jury list was Julius Catlin, Jr., and there being no two individuals designated by these names, it was held by the same judge that this mistake was immaterial, as there was no deception as to the real person intended by the name.³

A person who caused himself to be registered as Robert Daniels, but was known and called Robert Stevens, was selected, summoned, and sworn as a juror under the name of Robert Stevens, and it was held that this difference in the name was not cause to set aside the verdict where it appears that he was the identical person registered, and the person whom the county commissioners selected.⁴

§ 75. *Right of Challenge to a Special Jury.* — It is obvious, from the limited number summoned on a special jury, that if the right of challenge be liberally exercised or allowed, there would frequently be difficulty in procuring a jury. In New York the right of challenge is allowed, and the same number of peremptory challenges, namely, two, as are allowed in other cases in a civil action, under chap. 134 of the laws of 1847. But peremptory challenges are very properly denied, in other States, in the case of a special jury. In New Jersey it is provided that a struck jury will not be allowed in a trial for any

¹ *Falmouth (Earl) v. Roberts*, 9 Me. & W. 469.

² *Daily Register* (N. Y.), Jan. 12, 1876.

³ *Daily Register* (N. Y.), Jan. 13, 1876.

⁴ *Shaw v. Newman*, 14 Fla. 128.

indictment for any offence where the party is entitled to challenge peremptorily;¹ and in an amendment giving a right to three peremptory challenges to the prosecution, it is provided that the act shall not apply to cases of struck juries.²

In Ohio, under a statute which provides that the jury "shall consist of the first twelve of the sixteen struck jurors, who shall appear, and are not challenged for cause, or set aside by the court," it has been decided that no peremptory challenge can be allowed to a struck jury.³ There is a similar wording in the Minnesota statute;⁴ and under the same construction, peremptory challenges would be denied. In England the right to peremptorily challenge a jury without cause, whether a common or a special jury, does not exist in civil actions.⁵

It has been decided in a late case in Pennsylvania, under an act which provides that "on the trial of all civil suits now pending, or hereafter brought in any of the courts of this commonwealth, the plaintiff and defendant shall have each four peremptory challenges," that a peremptory challenge may be made to a juror on a struck list.⁶

V. PETIT JURY.

§ 76. *Meaning of Term in Law.* — This jury is *par excellence* the one most valued and cherished, and the one most familiar in its action and effects. It implies a body of twelve men *ex vi termini*, called together to determine a contested matter of fact from the evidence laid before them; and a trial jury of any other number is unknown to the common law, and would not be such as our various Constitutions guarantee.⁷ A late authority gives a full and clear definition of this jury, viz: "A petit, petty, or traverse jury, is a body of twelve men who are sworn to try the facts of a case as they are presented in the ev-

¹ Nixon's Dig. 449.

² Ibid. p. 453.

³ Cleveland, &c. R. R. Co. v. Stanley, 7 Ohio St. 155.

⁴ 2 Bissell's St. 836.

⁵ Creed v. Fisher, 18 Jur. 228. In the Circuit Court of the United States for the third circuit, no peremptory challenges are allowed to either side, where the jury has already been struck on both sides. Blanchard v. Brown, Wallace Jr. 309.

⁶ McDermott v. Hoffman, 70 Pa. St. 31. Under the practice in Georgia, "striking a jury" is equivalent to challenging them. O'Byrne v. State, 29 Geo. 36.

⁷ 2 Hale P. C.; 1 Chit. Cr. L. 505; Dixon v. Richards, 2 How. (Miss.) 771.

idence placed before them. Any less than this number of twelve would not be a common law jury, and not such a jury as the Constitution guarantees to accused parties."¹ The definition given in the California Code of Procedure may also be taken as a very apt and correct one. It is there said, "A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine by a unanimous verdict, a question of fact. It consists of twelve men unless the parties to the action agree upon a less number."² But it is held that in a criminal case, no less than twelve, even with the consent of the accused, can constitute a trial jury.³ But where in a civil action thirteen composed the jury with the defendant's knowledge and assent, it was held valid.⁴

§ 77. *Unanimity of the Jury.* — The unanimity of the twelve members constituting the jury is another essential attribute of a trial jury. To accept a verdict of any number less than the whole is quite foreign to the idea suggested by a jury trial as it has been established for centuries, and as now generally presented to us. It often happens that the long continued sanction and practice of a custom, or rule, obtains for it unquestioned authority and general acquiescence, and gives it a *raison d'être*, so that few are disposed to question its expediency or reasonableness. "Time consecrates, and what is gray with age becomes religion." So it is with respect to the

¹ Cooley, Const. Lim. p. 319.

² Sections 193, 194.

³ *Work v. State*, 2 Ohio St. 296; *State v. Everett*, 14 Minn. 439; *People v. O'Neil*, 48 Cal. 257; *Cancemi v. People*, 18 N. Y. 128.

⁴ *Berry v. Kennedy*, 5 B. Mon. 120; *Russell v. Neal*, 7 Monr. 407. The reasons why the number of the petit jury is twelve, are quaintly given by Giles Duncomb, in a work, *Trials per Pais*, published in 1793. At p. 93 he says: "Now for the quales, and then you say the number must be twelve by the common law. For quality (*liberos et legales homines*), and first of their number twelve; and this number is no less esteemed by our own law than by holy writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number twelve to try us in our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve. Therefore, not only matters of fact were tried by twelve, but in ancient times twelve judges were to try matters of law in the Exchequer Chamber. . . . And the law is so precise in the number of twelve, that if the trial be by more or less, it is a mistrial.

unanimity required in a verdict of a jury; the practice is so ancient and so long sanctioned, that the idea of unanimity becomes inseparably connected in our minds with a verdict.

It has been insisted on for many centuries; yet at one time, as we have shown in a former chapter, it was not essential. The rule is said to have grown out of the practice of *afforcing* a jury, that is, by adding new members, in case of a disagreement until twelve were found who agreed in a verdict. In early times, it is said a verdict was taken from eleven jurors, if they agreed, and the "refractory juror" was committed to prison.¹ However, it was decided in the time of Edward III. that the verdict of less than twelve was a nullity, and the court said that the judges of assize ought to carry the jury about with them in a cart until they agreed.² This singular method to force unanimity was practised at a very early day. Thus in the time of Edward I., as appears from Fleta,³ it was said the sheriff should cause the jurors in an assize to be kept *sine cibo et potu* until they agreed, and at that time it was in the option of the justices either to compel the jury to agree, or to *afforce* the jury by adding jurors to the majority until twelve were found to be unanimous.⁴ With regard to this unanimity,

¹ Bro. Abr. Jurors, Pt. 53; Fitzher. Abrid. Verdict, 40.

² 41 Assis. 11.

³ 3, c. 9.

⁴ Bentham (Art of Packing, p. 45) speaks of the practice of forcing unanimity as arising in an age of gross and cruel barbarism.

The former practice was to lock up the jury in a room, without meat, drink, or fire, or candle. On the trial of the Seven Bishops this practice was rigorously observed with the jury. In a letter from John Ince to the Archbishop of Canterbury, we find a striking allusion to this practice, and also to the anxiety always evinced to learn something of the proceedings of the jury while so incarcerated. In the first chapter of this work, I had occasion to refer to the writer of these letters, showing the mode in which a jury was treated by a victorious party. The following letter is valuable as giving a glimpse of a jury in deliberation at that day.

"May it please your Grace:

"We have watched the jury carefully all night, attending without the door on the stair-head. They have, by order, been kept all night without fire and candle, save only some basins of water and towels this morning about four. The officers and our own servants, and others hired by us to watch the officers, have, and shall constantly attend, but must be supplied with fresh men to relieve our guard if need be.

"I am informed by my servant and Mr. Grange's, that about midnight they were very loud one with another, and that the like happened about three in the morning, which makes me conclude that they are not yet agreed. They beg for a candle to light their pipes, but are denied." Law Magazine, vol. vii. p. 54.

Cockburn, C. J., says, in *Winsor v. Queen*,¹ "Our ancestors insisted on unanimity as of the essence of the verdict, but were unscrupulous how that unanimity was obtained. Whether the minority gave way to the majority, or the reverse, appeared to them a matter of indifference. It was a contest between the strong and the weak, the able-bodied and the infirm, as to who best could bear hunger and thirst, and all the discomforts incident to the confinement. . . . In our day we look upon trial by jury, and the principle upon which juries ought to find their verdicts, in a different way. We desire unanimity it is true, but the unanimity not of coercion but of conviction."

It was laid down that in case the jury did not agree in a verdict at the time of the adjournment of the assizes the judges should take them in carts to the next county and receive a verdict there.² However, that such a mode of enforcing agreement was ever used is questioned by Cockburn, C. J., in the case above; he says "that notion is founded upon loose dicta in the book of Assizes servilely copied by text writers on criminal jurisprudence. I doubt whether it was ever done, and there is nothing extant to show that such was ever the practice."³

§ 78. *Reasonableness of the Requirement.* — The requirement of unanimity may have had some good ground, and probably had its origin when the jury had the character of a body composed of mere witnesses, and when a verdict was given on their own knowledge of the facts; for it was considered that when a majority testified to a state of facts on their own knowl-

In *Rex v. Henney*, 1 Burr. 647, the jury went out a little after dark, taking letters, &c., with them, and soon sent to desire leave to have candles, which the officer who brought in their message said he was sworn 'not to let them have,' unless it should be so ordered. Lord Mansfield asked the counsel if either side objected to it, and they not objecting, the permission was given, and the jury had the candles!

¹ 118 Eng. Com. L. 170.

² 2 Hale P. C. 297; 3 Bl. Com. 376; *Rex v. Ledrington*, 1 Vent. 26. Where a sheriff told a jury after they had retired that the judge had ordered that unless they agreed on a verdict speedily, they should be carried to the next county, and that a vehicle was ready to take them, their subsequent verdict was set aside. *Gholston v. Gholston*, 31 Geo. 625.

³ The time during which a judge should keep a jury together in order to bring them to an agreement, has until lately always depended upon his discretion. By act of 22 & 23 Victoria, c. 7, the court is permitted to discharge juries in Scotland after a period of six hours in civil cases.

edge, and a small minority disagreed and refused to agree with the majority, that the minority wilfully and corruptly shut their eyes to the truth; and under this view they were considered liable to punishment. This is believed to have been the foundation of the rule requiring unanimity in the verdict.

Whatever general acquiescence may have been given to this rule in former times, it is quite evident that many able writers and investigators in modern times question the expediency and reasonableness of the rule, and condemn it as impracticable and an impediment to a due administration of justice. Bentham, referring to this requirement, says: "If the mode of forming verdicts had been the work of calm reflection, working by the light of experience, in a comparatively mature and enlightened age, some number, certain of affording a majority on one side, viz, an odd number, would, on this as on other occasions, have been provided; and to the decision of that preponderating number would of course have been given the effect of the conjoint decision of the whole."¹

The arguments in favor of unanimity may be recapitulated as follows: It is claimed that as each member of the jury is sworn to declare the truth according to his conscience, that a single member, if conscientiously impressed with a view of a state of facts, different from the others, is as much entitled to have that view considered, as the view of the majority. That when unanimity is required, the facts in the case are more thoroughly and fully investigated, with the view of bringing

¹ "Art of Packing Juries, p. 44. The opinion is very generally obtaining ground that this unanimity is unreasonable, and should not be enforced in civil trials at least. Lieber insists that it should not be insisted on in either criminal or civil actions. See a letter of his in *American Law Register*, vol. vi. p. 727, where he claims that an agreement of two thirds shall be sufficient for a verdict in all cases, both civil and penal, except in capital cases, when three fourths must agree to make a verdict valid. He shows that in Scotland no unanimity is required in penal trials, nor in France, Italy, Germany, nor in any country whatever except in England and the United States. In England the commissioners appointed in 1830 to report upon the courts of common law, say it is difficult to defend the justice or wisdom of the rule. They proposed that the jury be kept in deliberation no longer than twelve hours, and at the end of that time if nine agreed in a finding, it should be taken as a verdict. In some of our States it is provided that a verdict may be taken in civil cases from nine of the jury (*vide* Genl. Stat. Conn. p. 39); and it is recently enacted in the new Constitution of Texas that if nine of the jury are agreed in a civil case it will make a verdict. In Nevada (art. 1, § 3), a verdict of nine out of twelve will stand as a true verdict in a civil case.

this unanimity about ; for if a mere majority are agreed at the first consultation, there would be no necessity to deliberate and reason together with the view of making a unanimous verdict. When a unanimous verdict is required, each member, however insignificant, has a right to explain his views, and to compel the majority to listen to them ; for it has well been said, truth is established by investigation and delay, but falsehood prospers by precipitancy. That the verdict of twelve men, if rationally obtained, is more likely to be correct than that of nine out of twelve. It is calculated, on the doctrine of probabilities, that the probability of error in a verdict, when a majority of nine out of twelve is sufficient for a decision, is about one to twenty-two, while if unanimity is exacted, it is one to eight thousand.¹ And that a decision of twelve men, when unanimous, will command more respect and weight than nine out of twelve, or than the decision of a mere majority.

§ 79. **Reasons against the Requirement.** — Those who contend against the reasonableness of the rule, maintain that in the majority of cases the unanimity is unreal, and is only obtained as a compromise ; that a corrupt or stupid juror may obstinately or wilfully hold out, and compel a disagreement, and a consequent failure of justice ; that it is more easy to corrupt a jury and defeat justice, because only one is necessary for this purpose when unanimity is required ; that it is practicably and obviously impossible, in a large majority of cases, to impress twelve men with exactly the same view of a state of contested facts ;² that, as Hale expresses it, “an ignorant parcel of men are sometimes governed by a few that are more knowing, or of greater interest or reputation than the rest ;” and that this method of decision is entirely singular and anomalous ;

¹ American Law Reg. vol. 6, p. 709.

² In an address of Lord Neaves, a Scotch judge, at a Social Science Association in England, reported in the Albany Law Journal, vol. 2, p. 341, he said, referring to the introduction of trial by jury in Scotland : “I, myself, think it was a mistake to adopt an exotic form, of which we had no experience, by borrowing from England a jury of twelve, and requiring unanimity. The Scotch mind is rather opinative, and did not understand how men could be brought to unanimity by a sort of compulsion, when they were really not unanimous, and were acting under the sanction of an oath.”

As against the unanimity required in a verdict, see an article in English Quarterly Law Review for 1832.

for in all deliberative bodies, in courts, in legislative assemblies, a decision of a majority is accepted. All these reasons are unquestionably worthy of consideration, and have had their influence on a great many minds, writers, and legislators. Without venturing to weigh and compare the reasons for or against unanimity, we must maintain that in criminal trials it is a valuable principle and safeguard. It is a safe and most valuable principle in criminal law that before a person should be convicted of an offence, and deprived of the most sacred rights a man can enjoy, life and liberty, there should be proof of his guilt beyond all reasonable doubt. And if, when the facts and evidence are placed before twelve men, who, we must presume, are conscientious, a single one of them has a doubt of the person's guilt, this ought to be sufficient to prevent a conviction. It is true there may be a possibility of corruption and a failure of justice ; but better a thousand times this, than that any one should ever be unjustly stigmatized and punished with ignominy as a criminal.

§ 80. *The Jury must come from the Vicinage.* — Another essential characteristic of a petit jury is that it shall be taken from the neighborhood where the cause of action arose. This principle was necessarily founded on the original character the jury possessed of being merely witnesses. It became in the course of time a most essential attribute, and, indeed, one that gave to the English jury its peculiar character and utility, and endeared it to popular favor. It gave to the jury the distinguishing name of a jury *de vicineto*. So strictly was this principle applied, that in early times it was necessary that some of the jury should be taken from the hundred in which the action lay, and if not the array might be challenged for a defect of hundredors.¹ The practice gradually became obsolete of requiring hundredors on the jury, and at length it was abolished in civil cases by statute 4 & 5 Anne, c. 6, and in respect to criminal actions by 24 Geo. II. c. 18. However, the jury were still to be taken from the body of the county, *de corpore comitatus*, and not *de vicineto*, or from any particular neighborhood, and such is still the requirement both here and in England.

¹ 3 Bl. Com. 259.

This requirement in the selection of a trial jury was always deemed an essential one to its efficiency and safety. When the Declaration of Rights was drawn up, embodying the rights claimed by the colonists, and which they deemed most sacred and indispensable, the jury was claimed with this qualification; they claimed the common law of England, and especially the trial by a jury of the vicinage;¹ and lest legislative or judicial action should overlook or violate this principle, many of the States in their fundamental law have specially provided for the selection of the jury from the vicinage, or body of the county.²

The decisions upon this point are somewhat conflicting. According to some, it does not prevent a change at the instance of the prosecution,³ while, on the contrary, other cases hold that the venue cannot be changed except by the assent of the accused, and that statutes authorizing the court to order the change upon request of the prosecution, and for good cause shown, are void and unconstitutional.⁴

In Tennessee a statute allowing "offences committed on the boundary line of two or more counties, or within a quarter of a mile thereof," to be tried in either county, was held void. The court said there was no "district" to which the language of the Constitution could apply, and that the trial must be in

¹ Curtis, Hist. of the Const. p. 23.

² Thus in Constitution of Alabama (1868), art. 1, § 8, the jury are to be "of the county or district;" so in Connecticut (1818), art. 1, § 9; "of the vicinage," Kentucky (1850), art. 13, § 12; "of the county," Mississippi (1868), art. 1, § 7; "of the vicinage," Missouri (1865), art. 1, § 18; "of the vicinage," Pennsylvania (1838), art. 10, § 9; "of the county," Tennessee (1870), art. 1, § 9; "of the county or district," Wisconsin (1848), art. 1, § 9; "of the county or district," U. S. Constitution, 6th amendment.

A flagrant attempt to violate this principle was lately attempted in reference to the charge of libel against Mr. Dana, the editor of *The Sun*; but was fortunately frustrated and condemned by Judge Blatchford of the United States Circuit Court. It was attempted to remove the editor from New York to Washington for a trial on a charge of alleged libel committed in his paper in New York, under a certain law which it was claimed gave this power.

Cooley, in his *Constitutional Limitations*, p. 320, very justly condemns this attempt to violate an old and cherished principle of the common law jury, and approves of the action of Judge Blatchford.

³ *State v. Miller*, 15 Minn. 344.

⁴ *Osborn v. State*, 24 Ark. 629; *Wheeler v. State*, 24 Wis. 52; *State v. Denton*, 6 Cold. (Tenn.) 539; *Kirk v. State*, 1 Cold. 344.

the county where the offence was committed ;¹ but in Minnesota a similar statute was pronounced valid, on the ground that it did not violate the intent of the Constitution.²

That the jury in the first place must be selected from the body of the county where the offence was committed, or the cause of action arose, is a proposition that ought now to be unquestioned ; whether the requirement is in the fundamental law or not, it has always been considered an essential attribute of the common law jury, just as much as it is required that that jury shall be unanimous, and shall be composed of twelve impartial, qualified men.

¹ *Armstrong v. State*, 1 Cold. 338.

² *State v. Robinson*, 14 Minn. 447.

CHAPTER III.

RIGHT TO TRIAL BY JURY.

- § 81. How esteemed.
- § 82. Right in the Colonies.
- § 83. Under United States Constitution.
- § 84. Under State Constitutions.
- § 85. Provisions for in Criminal Cases.
- § 86. Provisions for in Civil Cases.
- § 87. How Right is determined.
- § 88. When generally denied.
- § 89. Right in Equity Suits.
- § 90. Former Practice in Equity.
- § 91. When a Matter of Discretion.
- § 92. Cases in which granted in Equity.
- § 93. Cases when denied in Equity.
- § 94. When Trial should be asked.
- § 95. Denied in Trial of Minor Offences.
- § 96. Limits of the Right.
- § 97. In Trial of Misdemeanors.
- § 98. Statutory Crimes and Proceedings.
- § 99. Right in Inferior Courts.
- § 100. Limits of this Right.
- § 101. Not denied if Right of Appeal be given.
- § 102. Must not be restricted by Conditions.
- § 103. In Proceedings for Contempt.
- § 104. In Proceedings of Eminent Domain.
- § 105. When Right exists generally.
- § 106. Right may be regulated.
- § 107. Right as impaired by a Nonsuit.
- § 108. In Committals to Reform Schools.
- § 109. Object and Importance of.
- § 110. Waiver of Right.
- § 111. Waiver in Civil Cases.
- § 112. When and how waived.
- § 113. Waiver in Criminal Cases.

§ 81. How esteemed. — Ever since Magna Charta, the right to a trial by jury has been esteemed a peculiarly dear and inestimable privilege by the English race; and whether in a strictly historical view the right was defined and secured by that instrument or not, it was nevertheless invariably appealed to, and implicitly relied on as unalterably and inviolably se-

curing the right among other valuable privileges guaranteed therein. During long centuries when popular rights were overborne by prerogative or despotism, those who claimed and were denied the right to such a trial, founded their demand on the guarantee of the Great Charter, and solemnly protested against its violation when the privilege was denied them; and whenever an invasion or violation of individual rights was threatened, the security afforded by this guarantee was relied on as an effectual safeguard either to repel the attack or nullify its effect.

It is most probable that it was on account of the popular regard for this right, and the general confidence in it, as well as the firm belief that it was based on and secured by *Magna Charta*, that efforts were so constantly and strenuously made to maintain the Charter, and bind rulers to a faithful observance of its provisions, as was done so frequently in the course of the struggles with English monarchical power. It was thus the right became familiar and dear, blended and fixed in the habits and customs of the people, and established and perpetuated by a continued course of judicial precedent and practice. So dearly was it esteemed, that in almost every instance when popular action organized to check the encroachments of power, and when the grievances and abuses suffered were enumerated, we find a denial of this right loudly and conspicuously complained of, and in the redress demanded its integrity and guarantee are insisted on. At the time of the accession of William III. to the English throne, a statement or list of grievances was drawn up, and also a list of the remedies sought, which were embodied in the famous Bill of Rights;¹ and it was then declared, "That jurors ought to be duly impanelled and returned; and jurors which pass upon men for high treason ought to be freeholders."

§ 82. **Right in the Colonies.** — The English colonists settled here with a deep-rooted regard for this right. It had been, no doubt, to them in the mother country a valuable protection. They brought it with them and established and cherished it as one of their dearest privileges, and in every enumeration of their rights and immunities, it takes a conspicuous place. It is notable, as showing their regard for this right, that

¹ Passed 1 Wm. & Mary, c. 36.

all that is extant of the legislation of Plymouth colony for the first five years consists of the single regulation: "That all criminal facts and also all manner of trespasses and debts between man and man shall be tried by the verdict of twelve honest men, to be impanelled by authority in form of a jury upon their oath."¹

The right was only established in Massachusetts in civil and criminal cases;² and also in Connecticut, but there it was provided that if the court were dissatisfied with the verdict, they might send back the jury to consider the same a second and third time, but not further.³ It is worthy of note that in the colony of New York it was assured in all criminal cases, but there was no reference to its application to civil cases.⁴ In the Declaration of Rights, the colonists showed their appreciation of their right to a trial by jury; in it they claimed the common law of England, and especially a trial by a jury of the vicinage.⁵

The strong and emphatic language in reference to the right of trial by jury in some of our early state Constitutions shows further the great estimation in which the privilege was held. Thus, in the New Jersey Constitution of 1776 it was held, "That the inestimable right of trial by jury shall remain confirmed as part of the law of the colony, without repeal forever."⁶

§ 83. Right under United States Constitution. — It was considered a singular omission of the Constitution of the United States, that it contained no provision for trial by jury in civil actions. It provided by article 3 for such trial in criminal cases, but was silent in regard to the trial in civil cases. The reason of this silence and omission is accounted for by the fact that the diversity of practice and form in jury trials in the several colonies made it difficult to adopt a measure that would command general acquiescence, and it was therefore considered best to leave the matter to the discretion of Congress. It is said that the convention that drew up the Constitution were

¹ 1 Palfrey's New England, 340.

² Story, Com. on Const. § 72.

³ Ibid. § 89.

⁴ Ibid. § 114.

⁵ Curtis on Const. vol. 1, p. 23.

⁶ McGear v. Woodruff, 33 N. J. 213.

greatly divided in opinion on the subject of a trial by jury in civil cases.¹ In a defence of the action of the convention in relation to this matter, it was said by the Federalist that "the best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails."²

However well-meaning the action of the convention may have been, it is certain the omission from the Constitution of a guarantee of a trial by jury in civil cases caused much public discontent and disapprobation, which was further increased by the language of the original articles giving to the Supreme Court appellate jurisdiction both as to law and fact, for then it was suspected that it was intended to abolish the jury in civil actions. It was said by the Supreme Court, in *Parsons v. Bedford*,³ that "one of the strongest objections originally taken to the Constitution was the want of an express provision securing the right of trial by jury in civil cases." The court said in that case, which was an appeal in a civil suit, "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

The impatience and anxiety of the people in reference to this omission were exhibited in conventions and in resolutions, and the agitation continued until all fears and doubts were finally set at rest by the addition to the Constitution of the seventh amendment, which provided: "In suits at common law where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved. And no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law." It is hardly necessary to state this amendment has reference only to suits in the federal courts, and does not limit the action of the States in their own legislation;⁴ and it has

¹ Story, Com. on Const. § 1763.

² Federalist, No. 83.

³ 3 Peters, 446.

⁴ *Livingston v. Mayor, &c.* 8 Wend. 100; *Colt v. Eves*, 12 Conn. 243.

reference only to suits at common law, and does not apply to suits in equity and admiralty. Thus, in a suit for a penalty against the master of a vessel, a jury trial is a matter of right, but not if it be against the vessel.¹

§ 84: Under State Constitutions. — “The trial by jury is justly dear to the American people,” was remarked by the United States Supreme Court; and this is emphatically illustrated in the decided and solemn manner in which the right is secured and guaranteed in the fundamental law of our States. Not content to trust to established usage, and immemorial custom sanctioned by courts and recognized by law as is the case in England, here the people deem the privilege so vitally important as to embody it with other cherished rights in their fundamental charters, from which courts and legislatures cannot swerve, and which cannot be altered, except by the people in their collective capacity, after careful and deliberate action.

In some of the Constitutions the right is not only expressly guaranteed, but it is also assured with its essential incidents of number, unanimity, and impartiality, and thus all power is taken from the legislature to change or modify the jury so as to deprive it of these essential qualifications, and make it different from the common law jury. It is evident that unless the principal distinguishing features of the jury were retained in their integrity, the trial would be a mere mockery, and the right would exist only in *name*. For it will be found as we proceed, that many dangerous innovations are sometimes made either by legislative action or judicial construction, so that the right becomes greatly impaired or very doubtful.

In expressly providing for this trial, the Constitutions of our States use phrases of different degrees of definiteness and description. These phrases may be divided into three classes. First, it is laid down that the right “shall remain inviolate,” implying that it shall be continued as it was known and used before; secondly, it is provided the right “shall be inviolate;” and thirdly, others hold more explicitly and expressly that it “shall be as heretofore used.” But no matter how expressed, whether, “shall be inviolate,” shall remain “inviolate,” or

¹ United States v. The Queen, 4 Ben. C. C. 237; Parsons v. Bedford, 3 Peters, 446.

"shall be as heretofore," there is a reference to the mode and nature of the trial as known and used at the time of the adoption of the constitutional provision; and in judicial construction there has been a remarkable unanimity in the interpretation of these clauses. Courts have held that it was not the intent of the people either to create, enlarge, or restrict the right, but to secure and establish it as it was previously known and practised in civil and criminal cases.

§ 85. *Provisions for in Criminal Cases.* — In many of the Constitutions, independent of the general provisions, there are express and definite provisions as to this right in criminal cases. Many follow the phraseology of the United States Constitution, in the sixth amendment, thus: "In all criminal prosecutions, the accused has a right to have . . . a speedy public trial by an impartial jury;"¹ and in many others in addition to this clause, as has been shown in another place, the trial is required to be in the county or district in which the offence shall be committed.

In other States, the right is guaranteed only "in prosecutions on indictment, or presentment, or information;"² thus providing for the trial of classes of minor offences and misdemeanors in a summary way, as was the custom in England under the common law, and several statutes in force before the adoption of our Constitutions.³

In the Constitutions of other States there are no *express* provisions for the trial in criminal cases beyond the general provi-

¹ Delaware, 1831, art. 1, § 7; New Jersey, 1844, art. 1, § 8; Rhode Island, art. 1, § 10; South Carolina, 1868, art. 1, § 13; Texas, 1869, art. 1, § 8.

² Story, Com. on Const. § 1784, gives a good explanation as to the effect of these terms. "A presentment is made upon the grand jury's own observation and knowledge, or upon evidence, without any bill of indictment at the instance of the people; an indictment is an accusation of an offence preferred to and found true on oath by the grand jury at the suit of the law officer of the people. An information generally differs in nothing from an indictment in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government *ex officio* without the intervention or approval of a grand jury. The process is rarely recurred to in America."

³ The following States have restricted the trial by jury to those graver offences by indictment or information: Alabama, 1868, art. 1, § 8; Connecticut, 1818, art. 1, § 9; Kentucky, 1850, art. 13, § 12; Mississippi, 1868, art. 1, § 7; Missouri, 1865, art. 1, § 18; Pennsylvania, 1838, art. 9, § 9; Tennessee, 1870, art. 1, § 9; Wisconsin, 1848, art. 1, § 7.

sion securing the trial forever inviolate, which, of course, gives it in all civil and criminal cases as was before the practice. This is the case in the Constitutions of Delaware, California, New York, and Nevada.

§ 86. **Provisions for in Civil Cases.** — In many of our state Constitutions there is a specific guarantee given of a trial by jury in civil cases, and the limits of the right are fixed and otherwise defined; while in others the application to civil cases is in a general provision, leaving it to judicial construction to determine the cases demanding a jury trial according to the course of the common law, or the former procedure in the State. Thus, in the Constitution of Maryland¹ it is provided: "The right of trial by jury of all issues of fact in civil proceedings in the several courts of law in this State where the amount in controversy exceeds the sum of five dollars shall be inviolably preserved." In the Constitution of West Virginia, in suits at common law the right is given when the value in controversy, exclusive of interests and costs, exceeds twenty dollars.² In Texas, in all cases at law and equity when the amount shall exceed the value of ten dollars.³

In New Jersey it is given to all cases above the value of fifty dollars, but the legislature is empowered to provide for the trial of cases of less value by a jury of six men.⁴ In North Carolina the provision has something of an expository character, for it says: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."⁵

§ 87. **How the Right is determined.** — From the preceding examination, it is seen that the right is in a broad general sense a constitutional one, guarded and assured by the fundamental laws of the land; but it is at the same time evident that it is not given, nor can it be claimed in *every* case where a person may suffer punishment or lose property. Hence the fact is presented for inquiry, In what cases can such a trial be

¹ Art. 15, § 6.

² Art. 5, § 16.

³ Art. 1, § 19.

⁴ Art. 3, § 14.

⁵ Art. 1, § 7.

demanding as a constitutional right? For however the right may be defined or fixed, the inquiry must be made, as a purely historical fact, when and in what cases it is a matter of right; for the interpretation has been uniformly given to the operative clauses of the Constitution, however they may be expressed in the three modes already pointed out, that the right is to be confined to those classes of cases only in which it was used at the time of the adoption of the Constitution, unless it is expressly restricted or extended to others.¹ In three States only the right is given in the most general language, without any limitation to former usage; thus, "the right of trial by jury shall be inviolate," is the clause in Kansas, Ohio, and Vermont, and even in these the same interpretation prevails. In *Kimball v. Connor*,² interpreting the effect of this clause, the court said, "That provision does not require every trial to be by jury. Nor does it contemplate that every issue, which by the laws in force at the adoption of the Constitution of the State, was triable by jury, should remain irrevocably triable by that tribunal. Trial by jury is guaranteed only in those cases where that right existed at common law. Such is the meaning of the constitutional provision referred to, and in statutory proceedings, proceedings in chancery, &c., the legislature is fully competent to dispense with the jury." In Vermont immemorial usage in the common law is looked to as determining the right under such a general clause.³

§ 88. When generally denied. — When this right can be claimed may be better determined by a consideration of those classes of cases and proceedings in which the right did not exist generally. Cases of an equitable nature were, as a general rule, in courts of equity carried on without the intervention of a jury, which was always claimed only as a right under the common

¹ *Stilwell v. Kellogg*, 14 Wis. 461; *Koppikus v. Commrs.* 16 Cal. 248; *Whitehurst v. Coleen*, 53 Ill. 247; *Ross v. Irving*, 14 Ill. 171; *Whallon v. Bancroft*, 4 Minn. 109; *Lake Erie, &c. R. R. Co. v. Heath*, 9 Ind. 558; *Byers & Davis v. Commonwealth*, 6 Wright (Pa.), 89; *Hone v. Treasurer*, 8 Vroom (N. J.). Where there have been several Constitutions, the right is in reference to its existence and practice before the last one. *Wynehamer v. People*, 13 N. Y. 378; *Tirgally v. Memphis*, 6 Cold. (Tenn.) 382.

² 3 Ark. 415.

³ *Plimpton v. Somerset*, 33 Vt. 283.

law; and cases of an analogous nature to equitable proceedings created by statute, have also been determined by equitable rules without a jury.

There were always classes of certain minor offences, either according to the common law or created by statute, which were punishable by certain magisterial officers in a summary way without the right to a jury trial; and certain offences created by statute, unknown to the common law, though involving grave punishment, it is claimed are not entitled to be tried by a jury; but to this there is not a general assent, as will be hereafter shown. And in suits for small amounts at common law, tried in inferior courts, a trial by jury was not granted.¹ In this general recapitulation are embraced the cases which have given rise to discussion as to the limit of the constitutional guarantee.

§ 89. *Right in Equity Suits.* — Wherever this right is not regulated or defined in our state Constitutions, it is a matter for judicial construction, based upon an examination of the former practice. In some of our States, it is regulated by a constitutional provision. Thus, in Texas it is provided: "In all cases of law or equity, when the matter in controversy shall be valued at or exceed ten dollars, the right of trial by jury shall be preserved,"² and it was there decided that this right is an absolute one, and not within the discretion of the court.³ In North Carolina it has been held that issues of fact must be decided by a jury in equity as well as at law, and it must appear on the face of the decree that they were so decided.⁴ In Georgia, causes in equity in which the facts are disputed are to be submitted to a special jury, and the court is to determine questions of law alone.⁵

¹ In *Flint River Steamboat Co. v. Foster*, 5 Geo. 206, it is said, enumerating cases in which jury trial is not given in civil cases: "In courts of ordinary and admiralty and in chancery, except in extraordinary cases to inform the conscience of the court, juries do not intervene. Mortgages are foreclosed, copies of papers established, lands partitioned, dower assigned, and judgments rendered on bail bonds, forthcoming bonds, jail bonds, and honest debtor's bonds, &c., and numerous other matters adjudicated daily in our courts without a jury."

² Const. 1869, art. 5, § 16.

³ *Faulk v. Faulk*, 23 Texas, 653.

⁴ *Taylor v. Person*, 2 Hawks, 298.

⁵ *Brown v. Burke*, 22 Geo. 574; *Mounce v. Byans*, 11 Geo. 180; *McDougald v. Dougherty*, 11 Geo. 570.

§ 90. **Right in Equity in Former Practice.** — As a matter of right, a jury trial could not be claimed in a court of equity, except in two important cases.¹ These cases were, when an heir-at-law was sought to be divested of his inheritance under a will, and equity viewed his rights so important and paramount that he had a right to an issue of *devisavit vel non*, at his request; the other case was where the right of a rector to the tithes of his parish was contested, he was granted a right to have an issue tried by a jury. In these cases, no matter what the amount or the conflict of the evidence was, it was the established rule to award an issue to be tried by jury, whenever demanded.² The granting of an issue for a trial by jury was, in other cases, entirely a matter for the discretion of the court; but this discretion, as it was exercised, followed a certain course and certain precedents, and it happened in this way, after a time, a practice was established, which gave parties, if not an absolute right, a right to complain if this discretion was not exercised according to practice and precedent. The practice became settled, that in certain cases where legal rights were involved, and where there was great difficulty in deciding the facts, the parties were allowed to bring an action, or to have an issue framed and tried by a jury. This was the former prac-

¹ Pomeroy, in his work, *Remedies and Remedial Rights*, speaking of the union of the systems of law and equity under the new practice, thus speaks of the hindrance to this: "Whether law and equity, whether the legal and the equitable methods and remedies can be completely united and consolidated in one homogeneous system similar to that which prevailed in Rome during the later empire, may be doubted. I am of the opinion that such a result cannot be reached until trial by jury is abandoned, and the magistrate is left to decide both the law and the facts in every civil proceeding. While the jury trial lasts, there are difficulties in the way of an absolute unity of method which seem to be insuperable. . . . As the necessity for a separate court of chancery arose in great part from the use of the jury trial by the common law courts, it hardly seems possible that this necessity has now been obviated, or that the equity tribunals and methods can be absolutely merged in those of the common law, and still less that the common law tribunals and methods can be so merged in those of equity as long as the jury trial — the original element of distinction — continues to exist." § 23.

² Daniell's *Ch. Pl. & Pr.* (4th ed.) p. 1075, and cases there cited; *Van Alst v. Hunter*, 5 Johns. Ch. 148; *Cahoon v. Levy*, 5 Cal. 294; *Rogers v. Rogers*, 3 Wend. 15; *Middleton v. Sherburne*, 4 Y. & C. 358; *Sneed v. Ewing*, 5 J. J. Marsh. 460. In New Jersey it is held that there is no reason for the court submitting the question of fact whether a will has been cancelled or surreptitiously destroyed to a jury, where the evidence is such as to create no embarrassing doubt in the mind of the court, although insisted on by one of the parties to the suit. *Hildreth v. Schillinger*, 2 Stock. Ch. 196.

tice in England, but under a late statute¹ the Court of Chancery can determine the disputed facts by or without a special or common jury. But it is not incumbent on a court of equity to grant relief in any suit concerning any matter in which a court of common law has concurrent jurisdiction.²

§ 91. When the discretion should be exercised by the court in granting or refusing a trial by a jury of issues in an equitable action, is an important inquiry on which depends another question, whether a party has a right to complain if this judicial discretion be improperly exercised; for while it has been held that a party has no absolute legal right to have an issue tried by a jury,³ it is also held that the court is bound to exercise its discretion properly and reasonably; and that a mistake in the exercise of the discretion was a just ground of appeal;⁴ and where the House of Lords thought that the court below had directed issues improperly, it reversed the order directing the issues, and remitted the cause with directions to the judge to decide upon the matter himself.⁵

In general, where there was contradictory evidence between persons of equal credit who had equal opportunities of informa-

¹ 25 & 26 Vict. c. 42.

² *Swaine v. Great N. R. R. Co.* 10 Jur. N. S. 191; *Clarkson v. Edge*, 10 Ibid. 871; *Darrell v. Pritchard*, 12 Ibid. 16.

³ *Colman v. Dixon*, 50 N. Y. 572; *Hatch v. Peugnet*, 64 Barb. 189; *Rathbun v. Rathbun*, 3 How. Pr. 139; *Silwell v. Kellogg*, 14 Wis. 461; *Weil v. Kume*, 49 Mo. 158.

⁴ *Townsend v. Graves*, 3 Paige, 457; *Belknap v. Trimble*, 3 Paige, 601; *Gardner v. Gardner*, 22 Wend. 526; *Drayton v. Logan*, Harp. Eq. 57. The right of appeal from an order denying a trial in an equity suit is denied in many of our States. Thus, in New Jersey no appeal lies from an order of the court granting or refusing an issue. *Black v. Lamb*, 1 Beasley, 108; *Black v. Shreve*, 2 Beasley, 455. So in Pennsylvania. *Scheetz's Ap.* 35 Pa. St. 88. In Massachusetts the ordering of an issue upon the application of the plaintiff is within the discretion of the presiding judge, and not open to exception. *Ward v. Hill*, 4 Gray, 593; *Crittenden v. Field*, 8 Gray, 626. In *Ray v. Doughty*, 4 Blackf. 116, it was held that a court of chancery may take the opinion of a jury as to any of the facts in controversy between the parties whenever it thinks proper to do so. In *McGowan v. Jones*, R. M. Charl. 84, it was held that although the practice in Georgia is to associate a special jury with the judge of the superior court, in the determination of chancery causes, there is no law which imposes the necessity of such association.

⁵ *Nichol v. Vaughan*, 2 Dow & C. 420; 5 Bligh N. S. 505. But in New York an order directing an issue was held not to be reviewable. *Brinckley v. Brinckley*, 56 N. Y. 192.

tion, and the evidence was so equally balanced that it became doubtful which scale predominated, an issue was directed in order that the court might be satisfied by the verdict of a jury of the truth or falsehood of the facts controverted.¹ In *Tappan v. Evans*,² it was said, "the court directs an issue for the better information of its conscience. If fully satisfied as to the evidence, they will not send it to a trial at law. Issues are frequently directed when matters of fact are mixed with matters of law. Where the uncertainty as to the validity of a title arises from questions of fact, it is most proper that they should be tried by a jury." The court, in *Townsend v. Graves*,³ gave the occasion and the reason of the rule so well as to give a leading principle; it said: "Issues should be directed only in those cases where there is a want of evidence, or the testimony is contradictory and so nearly balanced that it is necessary to have an open and rigid cross-examination of the witnesses before the jury who are to decide the questions of fact upon their conflicting testimony."

§ 92. Cases in which granted in Equity. — Following the general principles of the last section, the courts have granted issues in the following cases: To try whether a will said to have been lost was in fact ever executed, and if so what were

¹ Daniell's Ch. Pl. & Pr. (4th ed.) p. 1072, and cases cited.

² 11 N. H. 131. See *Andrews v. Pritchett*, 66 N. C. 387.

³ 3 Paige, 453; *Pomeroy v. Winship*, 12 Mass. 514; *Lapresse v. Falls*, 7 Ind. 692; *Fisher v. Porch*, 2 Stockt. (N. J.) 243; *Munson v. Reed*, 1 Clarke, 580; *Hooe v. Marquess*, 4 Call, 416; *Marshall v. Thompson*, 2 Munf. 412; *Dale v. Roosevelt*, 2 Johns. Ch. 255; *Lea v. Beatty*, 8 Dana, 207. While in general the court is allowed to judge of the expediency or the necessity of an issue to be tried by a jury in equity cases, in some States, as we have pointed out in another section, this discretion is in some instances controlled, and it is obligatory on the court to grant the right. Thus it has been held in New Hampshire, in the case of *Marston v. Brackett*, 9 N. H. 336, that a *defendant* in a bill in chancery has a constitutional right to have matters of fact alleged in the bill and denied in the answer, if they are material to the decision of the cause, tried by a jury. Whether *either party* was not so entitled was left without decision in *Dodge v. Griswold*, 12 N. H. 575. But in *Hoitt v. Burleigh*, 18 N. H. 389, Parker, C. J., said: "We have settled that a party to a bill has a constitutional right to require a trial by jury of a contested matter of fact, if he asserts that right at the proper stage of the cause." These decisions are based on the phraseology of their Constitution (Bill of Rights, art. 20), where the right to trial by jury is given generally except in cases arising on the high seas, and such as relate to mariners' wages.

its provisions;¹ to try whether the testator was sane or seriously intended the proposed will as such, or had subsequently nullified it by a republication of a former will, or by a revocation;² to try the validity of a will of real estate, where the question arose collaterally, and the heir insisted on the invalidity of the will in his answer.³ In cases of fraud, where the testimony is conflicting and unsatisfactory;⁴ and to try whether the execution of a certain deed was an act of fraudulent preference in contemplation of bankruptcy.⁵ To try whether a deed was duly and fairly executed;⁶ to try the genuineness of a deed forming a link in the chain of title, on a bill for the specific performance of a purchase of land.⁷ To try the question as to whether an assignment of a mortgage was intended as an absolute one, or a mere authority to enable the defendant to collect, as being doubtful, the court directed an issue;⁸ and to try whether an absolute bill of sale was intended only as a security.⁹ To try whether the sale of a horse or other property was really intended as a shift to evade the statute against usury;¹⁰ and to try a question of usury, arising out of disputed facts, upon the determination of which the right of the plaintiff to a decree against the defendant depended.¹¹ An issue was directed to try a question of forging a deed on a bill issued for the purpose of settling the title to a large tract of land, and to prevent a multiplicity of suits.¹² To try the title to land where the purchaser was compelled to accept the title;¹³ and to ascertain the damage sustained by the purchaser, by the loss of eighty-eight acres of land recovered from him by a better title.¹⁴ To try the question of the marriage of parents,

¹ *Brent v. Dold*, Gilmer, 211.

² *Banks v. Booth*, 6 Munf. 385.

³ *Colton v. Ross*, 2 Paige, 396.

⁴ *Hoe v. Marquess*, 4 Call, 416; *Stewart v. Inglehart*, 7 Gill & J. 132.

⁵ *Grurgeon v. Gerrard*, 4 Y. & C. 119.

⁶ *Anon.* 1 Desaus. 124; *Pomeroy v. Winship*, 12 Mass. 514; *Dodge v. Griswold*, 12 N. H. 573.

⁷ *Delancy v. Seymour*, 5 Cow. 714.

⁸ *Fisher v. Porch*, 2 Stockt. (N. J.) 243.

⁹ *Knibb v. Dixon*, 1 Rand. 249.

¹⁰ *Douglas v. McChesney*, 2 Rand. 109; *Ward v. Hill*, 4 Gray, 593.

¹¹ *New Orleans G. L. & B. Co. v. Dudley*, 8 Paige, 452.

¹² *Apthorpe v. Comstock*, 2 Paige, 482.

¹³ *Bowman v. Middleton*, 1 Desaus. 159; *Fox v. Ford*, 5 Rich. Eq. 349.

¹⁴ *Smith v. Martin*, 4 Desaus. 149.

and the legitimacy of a child;¹ to try a claim in a creditor's suit, and a question of title in a partition.² To try the fact of a secret partnership.³ Where a prior judgment is impeached by a creditor under a subsequent judgment on the ground of fraud, the Supreme Court will in its discretion order the issue to be tried by a jury.⁴

§ 93. *Cases in which denied in Equity.* — Where the amount in controversy is small, and the facts can be satisfactorily ascertained by discovery an issue at law will not be awarded.⁵ In a case whether a will has been cancelled or surreptitiously destroyed, it was held there was no reason to submit the question of fact to a jury when the evidence is such as not to create embarrassing doubt in the mind of the court.⁶ Questions concerning trust funds, being purely of equitable cognizance, are not required to be submitted to a jury,⁷ nor in statutory proceedings for the enforcement of liens for supplies, &c., on ships, as the lien might have been enforced in equity.⁸ And in some classes of cases there ought to be no reference of issues to a jury, as the taking and stating the accounts of a partnership, which it is an error to refer to a jury;⁹ nor in a suit alleging cancellation and delivery of a note by mistake and asking for relief.¹⁰ In a case where a long account is involved, a compulsory reference is proper and not a jury trial.¹¹ It is not given in suits to foreclose a mortgage, even if there be personal judgment for the deficiency.¹² But the jurisdiction of equity cannot under color of statutory amendments or proceedings be extended by the legislature so as to embrace

¹ *Vaignear v. Kirk*, 2 Desaus. 640.

² *Ringold v. Jones*, 1 Bland, 89; *Larkin v. Mann*, 2 Paige, 27.

³ *Cocke v. Upshaw*, 6 Munf. 464.

⁴ *Tradesmen's Bank v. Fairchild*, 31 N. J. L. 371.

⁵ *Garwood v. Eldridge*, 1 Green Ch. 290.

⁶ *Hildreth v. Schillinger*, 2 Stockt. Ch. 196.

⁷ *Sands v. Kimbark*, 27 N. Y. 147.

⁸ *Sheppard v. Steele*, 43 N. Y. 52.

⁹ *Berkey v. Judd*, 14 Minn. 394.

¹⁰ *Weil v. Kume*, 49 Mo. 158.

¹¹ *Dane County v. Dunning*, 20 Wis. 210; *Church v. Freeman*, 16 How. Pr. 294.

¹² *Stilwell v. Kellogg*, 14 Wis. 461; *Conn. &c. Ins. Co. v. Cross*, 18 Wis. 109. See *Clemenson v. Chandler*, 4 Kan. 558.

matters which before the adoption of a Constitution were common law rights, and within the exclusive jurisdiction of common law courts, so as to cut off the right of trial by jury.¹

§ 94. At what Stage Trial should be asked. — No order will in general be made for the trial of an issue in a court of equity except by consent, before the question on which the issue is sought comes before the court for adjudication.² Sometimes issues were directed by an interlocutory application when it appeared that there were questions that could not be properly tried by the court.³

It is held generally that after an issue has been submitted to the court by the parties, it is too late to demand a trial of a matter of fact arising out of the issue; the application must be made before the decree. Thus, in *Belknap v. Trimble*⁴ it was said the right should be asked upon the hearing in the court below, and it was too late to raise the question afterwards. At what stage of the proceedings application for a trial by jury must be made to entitle the party to an issue, was left undecided in *Marston v. Brackett*; ⁵ but in *Hoitt v. Bursleigh*⁶ it was determined, if a party exercises his constitutional right to require a trial by jury, it should be after the replication and the taking of testimony; and it has been decided that a motion for an issue is premature before the pleadings are closed; the court should see what facts are controverted, and the plaintiff should have the benefit of the discovery the defendant may make in his answer.⁷

It is decided that the court may, on its own motion, for sufficient reasons, cause issue to be framed after the testimony is taken.⁸ In a late case decided in the New York Court of Ap-

¹ *North Penn. &c. Co. v. Snowden*, 42 Penn. St. 488; *Tabor v. Cook*, 15 Mich. 322.

² *Bradley v. Bevington*, 4 Drew. 511; *George v. Whitmore*, 26 Beav. 557; *Fullager v. Clark*, 18 Ves. 481; *Ridgway v. Roberts*, 4 Hare, 106, 119.

³ *Bacon v. Jones*, 3 Jur. 994; *Townley v. Deare*, 3 Beav. 213; *Lewis v. Thomas*, 3 Hare, 26, 29; *New Orleans G. L. & B. Co. v. Dudley*, 8 Paige, 452.

⁴ 3 Paige, 601.

⁵ 9 N. H. 349.

⁶ 18 N. H. 389.

⁷ *Tibbetts v. Perkins*, 20 N. H. 275; *Charles River Bridge v. Warren Bridge*, 7 Pick. 369, 370.

⁸ *Hoitt v. Bursleigh*, 18 N. H. 390.

peals, it was held that after a trial of an equity action by, and a submission thereof to the court, it has power, while it remains in its hands under advisement, of its own motion, to direct certain issues therein to be passed upon by a jury, and an order to that effect was not reviewable in the court above.¹

The matter is, however, to a great extent regulated by the practice and the rules of the various courts. Thus, under the New York Code, by the rules of the court, if either party desires a trial by a jury in a suit which formerly would have been a suit in chancery, he must give notice of a motion therefor, within ten days after an issue joined.²

§ 95. **Right denied in the Trial of Minor Offences.**—It is evident that a jury trial cannot be demanded in every case where a person is punished for a criminal offence. Such was not the practice at any time in the common law, and before the adoption of our Constitutions. It would be manifestly impracticable; for there must be some speedy, summary way to deal with a large and frequent class of minor offences not entailing a punishment of a grave and infamous character. Accordingly, there has always been a method for punishing offences of a minor grade, by inferior judicial officers, generally justices of the peace, without a trial by jury; and as our Constitutions giving the right of a trial by jury, either expressly or impliedly, refer to this antecedent practice, it will be necessary to consider what that was, to ascertain what grade or class of offences was so punished. At first the question will be considered in reference to the general provision, referring to the right as it was known or practised; for in many of the state Constitutions the question is not left open for inquiry as to the preceding practice; the officers, method, and offences are more specifically determined.

It is difficult to ascertain any general, uniform rule regulating this practice; for a great diversity is found to exist in the several States, arising no doubt from the diversity in their early practice, either in colonial times, or in the early days of the state organizations. If there be any general rule in common to all it is this: that in England, under the common law and various statutes, and here at the time of the

¹ *Brinckley v. Brinckley*, 56 N. Y. 192.

² *O'Brien v. Bowes*, 4 Bosw. 657.

adoption of our Constitutions, the trial of minor offences, such as trivial assaults and batteries, the punishment of rogues and vagabonds, the punishment of intoxication, the punishment of persons abandoning their families, and the punishment of the violation of laws and ordinances of local municipal bodies, was without a jury, before magistrates generally denominated justices of the peace.¹

§ 96. *How far denied.* — It may be stated as a general rule, that for any criminal offence for which a person is liable to *infamous punishment*, a trial by jury cannot be denied him. Under this rule, the question arises as to what punishment, or rather what crimes will render a person infamous. We may say generally, it is such a crime as will entail, as a punitive consequence, after sentence, the forfeiture of certain political rights, as the right to be a witness, and the right to vote. In the Roman law, an *infamis* was deprived of his political rights, but his civil rights were preserved.² Under our statutes generally, a person who is convicted of a felony, and sentenced to a state prison or penitentiary, is subjected to infamous punishment. Thus, in New York a felony is construed to mean an offence for which the offender on conviction shall be liable by law to be punished with death, or by imprisonment in a state prison, and every such crime is an *infamous crime*.³ The definition was given in order to attach a more fixed meaning to felony, which had a very indefinite meaning at common law.⁴ At common law, the word comprised every species of crime

¹ Extensive and summary police powers are constantly exercised in all the States of the Union for the repression of breaches of the peace and petty offences; and these statutes are not supposed to conflict with the constitutional provision securing to the citizen a trial by jury. Sedgwick, Stat. Law, p. 548; Byers v. Commonwealth, 42 Penn. St. 89; Jones v. Robbins, 8 Gray, 329; Duffy v. People, 6 Hill (N. Y.), 75; Murphy v. People, 2 Cowen, 815; People v. Fisher, 20 Barb. 652; State v. McCory, 2 Blackf. 5; McGear v. Woodruff, 4 Vroom (N. J.), 213; Plato v. People, 3 Park. Cr. R. 586; State v. Noble, 20 La. Ann. 325; Williams v. City Council, 4 Geo. 509; Johnson v. Barclay, 1 Harr. (N. J.) 1.

² Savigny, Droit Rom. § 79. The crimes which rendered a person infamous were generally treason, 5 Mod. 16; felony, Co. Litt. 6; receiving stolen goods, 5 Cuah. 287; perjury, forgery, Co. Litt. 6; piracy, 2 Roll. Ab. 886; swindling, cheating, Fost. 289; barratry, 2 Salk. 690; conspiracy, 1 Leach Cr. C. 442.

³ 2 Rev. Stat. Mich. tit. 30, c. 161, § 18; Wisc. c. 141, § 14; Maine, c. 161, § 167; Laws of Georgia (Hotchkiss), p. 703.

⁴ Klock v. People, 2 Park. Cr. R. 676.

which occasioned the forfeiture of either lands or goods, or both; or to which capital or other punishment may be super-added according to the degree of guilt.¹

Not all crimes which were felonies at common law must be tried by a jury. For petit larceny was a felony at common law, yet it has been punished in England and here without a jury trial in a summary manner by police magistrates. Hence, a statute authorizing persons charged with petit larceny to be tried in the special sessions without a jury, was held valid because similar statutes existed at and before the adoption of the Constitution.² But petit larceny is not deemed so far a felony in New York as to disqualify a person as a witness, and does not render him infamous.³

§ 97. In Trial of Misdemeanors. — There is a very indefinite meaning attached to the word misdemeanor in law; it includes a large class of offences not very well defined; and its signification is not at all uniform in our various States. In a broad general sense, a misdemeanor comprehends every crime less than felony, and is generally used in contradistinction to felony.⁴ In New York it comprehends all crimes less than felony, and, therefore, whose punishment is not in the state prison.⁵ The statutes of Arkansas⁶ define a crime or misdemeanor as “consisting in a violation of a public law, in the commission of which there shall be union or joint operation of act and intention or criminal negligence,” and the same definition is given in the statutes of Illinois.⁷ In another sense a misdemeanor may be applied to all those crimes, whether of commission or omission, for which the law has not provided a particular name; and many offences are by statute punishable as misdemeanors, *eo nomine*. The practical question is, must

¹ 4 Bl. Com. 94. Under the statutes of Missouri a felony is an offence for which a party on conviction *may* be imprisoned in the penitentiary, and not where on conviction he *must* be imprisoned. *Johnston v. State*, 7 Mo. 183. A felony under the laws of Indiana is defined to be a crime punishable by confinement in the penitentiary. *State v. Smith*, 8 Blackf. 489.

² *Murphy v. People*, 2 Cow. 815; *People v. Godwin*, 5 Wend. 250.

³ *Carpenter v. Nixon*, 5 Hill, 260.

⁴ 4 Bl. Com. 5; 3 Burn's Inst. 557.

⁵ 2 Rev. Stat. 703.

⁶ Chap. 51, § 1.

⁷ Rev. Stat. (1845) c. 30, § 1.

the trial of a misdemeanor be by jury, or can any other mode of trial be provided by statute? From what has already been stated in a previous section, it is seen that all crimes are not entitled to be tried by jury; hence it must follow that all misdemeanors are not required to be so tried. The question then is, are any misdemeanors to be so tried? understanding for the present, by the term, such crimes as are not punishable as felonies. According to a case in New York,¹ it is held that the legislature would have the power to provide for the trial of misdemeanors by a jury of twelve, six, or any other number, or without a jury. But in the same case it is said that a jury trial can be demanded for a crime for which an indictment may be presented by a grand jury. The reasoning in the case is that for a misdemeanor no indictment can be presented, which is quite unsound; for at common law, a great many misdemeanors are indictable. Thus, all misdemeanors that are *mala in se*, such as mischievously affect the person or property of another, or openly outrage decency, or disturb public order, or are injurious to public morals, or are a breach of official duty, when done corruptly, are the subject of indictment.² We should say, therefore, that for any misdemeanor for which a person can be indicted, he must have a trial by jury, unless it is otherwise provided in the Constitution.³

It is competent, however, for the legislature to prescribe what shall be the mode of trial for a misdemeanor created by statute, which was not indictable at common law, and for which no infamous punishment is provided.⁴ But the limit

¹ *People v. Fisher*, 20 Barb. 652.

² 1 Hawk. P. C. c. 5, § 1; 1 East P. C. c. 1, § 1; 1 Russell on Cr. 46.

³ *Jones v. Robbins*, 8 Gray, 329; *People v. Johnson*, 2 Park. Cr. R. 322.

⁴ We have discussed this question in the text in reference to the general constitutional provision; but in many of our state Constitutions there are express provisions in reference to misdemeanors, and the crimes are more specifically defined. The Constitution of Arkansas provides that "no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment," and it is held that one accused of the criminal offence of assault and battery is entitled to a jury trial. *State v. Cox*, 3 Eng. 436. The Constitution of North Carolina (art. 1, § 13) says, "The legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal." West Virginia (art. 2, § 8), the Constitution provides: "The trial of crimes and misdemeanors, unless herein otherwise provided, shall be by jury." In Alabama (art. 1, § 10), the Constitution specifies the crimes for which persons can be tried in inferior courts without a jury, viz: "Cases of petit larceny, assault and battery, affray, unlawful assemblies,

must be carefully observed, for the legislature cannot, under cover of complying with the principle, exceed or violate it by adding to misdemeanors punishments of a grave character, or impairing the right by hampering it with onerous conditions. Thus, the provisions of a prohibitory liquor law which allowed offences against it to be tried in the special sessions without a jury, or a so-called jury of six, were held void, because at the time of the adoption of the Constitution misdemeanors by violation of the excise laws were triable only in the general sessions, or oyer and terminer;¹ and a statute of Rhode Island making the right to a jury in a particular criminal case (violation of a prohibitory liquor law) to depend upon the accused giving a bond with surety, for the payment of the penalty and costs, was declared invalid.²

Again, it is held that the legislature may add new offences of the same grade or class as those which were triable without a jury at the adoption of the Constitution; but a summary method of trial cannot be prescribed for an offence which was indictable at the common law, as for instance keeping a house of ill-fame.³ But a statute providing that keepers of houses reputed to be houses of ill-fame may be required to give sureties, &c., is valid.⁴ A statute authorizing judgment by the probate court, without a jury, on charges of embezzlement preferred by administrators, was held void.⁵

vagrancy, and other misdemeanors." In the Constitution of Georgia of 1868, misdemeanors can be tried without a jury. *Allen v. State*, 51 Geo. 264.

¹ *Wynehamer v. People*, 13 N. Y. 378.

² *Greene v. Briggs*, 1 Curtis C. C. 311.

³ *Warren v. People*, 3 Parker Cr. R. 544; *Slaughter v. People*, 2 Doug. (Mich.) 334.

⁴ *State v. Maine*, 31 Conn. 572.

⁵ In many of our States there is a tendency to abridge the power of the legislature to impair in any way the right to trial by jury even in minor offences. The right is strictly defined in constitutional provisions, and decisions on such have confined the right to deny it to a limited class of cases. Thus, in Texas statutes authorizing summary criminal and quasi-criminal prosecutions in inferior courts have been held invalid, because they did not provide for a jury trial; *Burns v. Le Grange*, 17 Tex. 415; *Smith v. San Antonio*, 17 Texas, 643; but these decisions are based on special constitutional provisions. In Ohio a statute providing for the trial of prosecutions for assault and battery, and similar minor offences, before the probate court with a jury of six, was held void; *Work v. State*, 2 Ohio N. S. 296; but this was also founded on the special language of the Constitution, viz: "In any trial in any court the accused shall be allowed," &c. In Vermont the constitutional guarantee extends to minor offences. *State v. Peterson*, 41 Vt. 504. It has been

§ 98. **Statutory Crimes and Proceedings.**—A very dangerous and reprehensible principle has been established in a few States, that the right to a trial by jury only exists in those cases where a person is charged with an offence that was a crime at common law, and that it does not extend to such crimes as have been created by statute since the adoption of the Constitution. This is the language of the court in *Van Swartow v. Commonwealth*:¹ "There is nothing to prevent the legislature from creating a new offence, and prescribing what mode they please of ascertaining the guilt of those who are charged with it!" This would establish a principle of the most pernicious consequences, if generally held and acted on. If carried out as enunciated by the court, a person may be subjected to infamous punishment, even imprisonment for any length of time, without a trial by jury, merely because it seemed fit to the legislature to make an act criminal which was before unknown as a crime. If this doctrine be accepted, it would be competent for the legislature to practically abolish trial by jury, and render the right to it an illusion and a mockery.

held in New York that a member of a militia regiment may be fined and imprisoned in time of peace. *People v. Daniell*, 50 N. Y. 274. In some States this is prohibited in the Constitution. California Constitution, art. 1, § 15. In the case of *Walker v. Sauvinet*, 13 Alb. L. J. 371, recently decided by the Supreme Court of the United States, the question was presented whether it was within the power of a statute of Louisiana, in a "civil rights" case, to authorize a trial without a jury. Chief Justice Waite delivering the opinion of the court, said, "So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the act of 1871 to the contrary. He insisted that he had a constitutional right to such trial, and that the statute was void to the extent that it deprived him of this right. All questions arising under the Constitution of the State alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By article 7 of the amendments, it is provided that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in courts of the United States. *Edwards v. Elliott*, 21 Wall. 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits of common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the fourteenth amendment to abridge. A State cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury."

¹ 24 Penn. St. 131.

And the same doctrine is held in *Tims v. State*,¹ where the language used is, "The offences which the statute was intended to reach were unknown to the common law, and have been created since the period we have named; and there was therefore no want of power in the legislature to make them triable before a justice without an indictment;" and the same doctrine is held in *Kansas*.²

But a more salutary and just principle—and one that commends itself as upholding the guarantee in its true spirit and integrity—has been held in New York and other States. For when the right extends "to all cases in which it has been hitherto used," the expression has been held to be comprehensive and generic, and sufficient to include statutory offences made since the adoption of the Constitution to *those classes of cases* in which a jury trial was in use at the time of such adoption.³

The principle was correctly and clearly stated by Johnson, J., in the last case, when he said: "It does not limit the right to the mere instances in which it had been used, but extends it to such new and like cases as might afterwards arise. For instance, felonies were triable only by jury. I do not doubt that all felonies must be tried in that way, and that by force of this section."

In Vermont it is held that the guarantee extends to all cases *fit to be tried by a jury*, according to the course of the common law, although the cause of action arise on a statute since the adoption of the Constitution;⁴ and this is substantially the doctrine held in the New York cases, and ought to be accepted as a general constitutional principle. In a late case in Alabama, an "Act for the protection of agricultural laborers" was declared unconstitutional, because it gave summary jurisdiction to the probate court to determine questions in regard to laborers' wages, without a right of appeal to a jury.⁵

¹ 26 Ala. 165.

² *Kimball v. Connor*, 3 Kans. 414.

³ *Fire Department v. Harrison*, 2 Hilt. 455; *Wynehamer v. People*, 13 N. Y. 378.

⁴ *Plimpton v. Somerset*, 33 Vt. 283.

⁵ *Thomas v. Bibb*, 44 Ala. 721. Cases in which the question has come up regarding the denial of a trial by jury under statutory proceedings have very frequently been in connection with the forfeiture of liquor. In many of the

§ 99. *Right in Inferior Courts.* — It had been a well established practice in England, and in our early colonial times, that actions for small demands were triable before certain officers having a limited jurisdiction, without a jury. These actions for small sums were generally tried in justices' courts; for even the high estimate placed by the English law on trial by jury, did not sanction its extension to cases involving small pecuniary demands of trifling importance. An act was passed in the third year of James I. c. 15, termed an "Act for the recovering of small debts," which gave certain officers in the city of London jurisdiction to try demands for debt to the amount of forty shillings, without a jury. Blackstone does not approve of the extension of this summary jurisdiction, because it is in derogation of the common law, and has a tendency to estrange the people from the valuable prerogative of a trial by jury.¹ The sum of forty shillings was fixed upon, then and for many years subsequently, as the dividing line between what was petty and insignificant, and what was of importance in point of value.² A jurisdiction to a limited amount, in civil and criminal cases, was given to courts of inferior and local jurisdiction without a jury by our early colonial laws. It existed in the colony of New

New England States it has been maintained that it is competent for the legislature to give jurisdiction to a justice of the peace to decree a forfeiture of liquors, even to an unlimited amount, provided a right to appeal to a jury is not denied. *State v. Brennan's Liquors*, 25 Conn. 278. In Vermont it has been held that a proceeding to condemn liquor under a statute is not an action at law in the proper sense, and that a trial by jury cannot be a constitutional right. *State v. One Bottle of Brandy, &c.* 43 Vt. 297.

In a case in Michigan, which was an action of debt to recover the penalty incurred for the violation of a liquor law, it was decided that a defendant is not entitled to a trial by jury, on his demand for the same, until he has paid the jury fee required in justices' courts. *People v. Hoffman*, 3 Mich. 248. See *Mountford v. Hall*, 1 Mass. 443; *Inhabs. Shirley v. Lunenburg*, 11 Mass. 379.

In a case in Missouri, the charter of the Bank of Missouri provided, that if the bank should at any time refuse to pay specie for any of its notes, it should forfeit at the rate of five per cent. per month, "to be recovered in a summary way by motion before a proper tribunal;" a motion was made under this provision for judgment against the bank, and the bank demanded a trial by jury, which was refused. It was held the bank had a right to demand a jury. *Bank of Missouri v. Anderson*, 1 Mo. 244.

¹ 3 Bl. Com. 82.

² In South Carolina, the court to which this jurisdiction was given was aptly styled "The court for the trial of small and mean causes." *Albany L. Journal*, vol. 8, p. 297.

York, from which arose the well-known justices' courts.¹ By the colonial laws, from an early period, either party in these tribunals could obtain, on special demand, a so-called jury of six men.²

The amount of their jurisdiction originally extended in New York only to forty shillings,³ but prior to the Revolution, and for forty years after, the limit was twenty-five dollars.⁴ An extension of this jurisdiction was made in 1818 in these courts to fifty dollars,⁵ and by this act the jury was to consist of six men, but if the amount was over twenty-five dollars, either party might demand and have a trial of twelve men.

In Connecticut, as in New York, the jurisdiction was fixed at first at forty shillings, and was varied until in 1795 it was fixed at seven dollars. The history and variation of the jurisdiction in that State are given in the case of *Curtis v. Gill*.⁶

Before the adoption of the Pennsylvania Constitution of 1790, justices of the peace in that State had jurisdiction in cases of debt or demand to an amount not exceeding £10.⁷ In New Jersey, before the Constitution of 1776, sixteen dollars was the limit in that State of the jurisdiction.⁸

§ 100. *Limits of this Right.* — The practical and important question in connection with the right in justices' courts is as to the power of the legislature to increase the amount of the jurisdiction in these courts, above what it was at the time of the adoption of the Constitution. It is evident this is a question of large importance in a constitutional point of view. It is one that has of late received wide examination in a historical and constitutional point of view in the courts of several States in which the subject has been under judicial examination. As a matter of fact, the legislature has in many instances increased this jurisdiction beyond the limit at which it was fixed at the

¹ 1 Livingston & Smith's Laws, 144, § 2.

² Ibid. 238, § 4; 2 Ibid. 170, § 1.

³ Laws of New York from 1691 to 1773, inclusive, c. 656.

⁴ Colonial Law of May 20, 1769, § 4.

⁵ Laws 1818, p. 84, § 22; Ibid. 287, § 2.

⁶ 34 Conn. 55.

⁷ *Emerick v. Harris*, 1 Binn. 416.

⁸ *McGear v. Woodruff*, 4 Vroom, 216.

time of the adoption of a Constitution, even where no express power was given in the Constitution. By the revision of the statutes in New York in 1830, the jury in justices' courts was limited to six men, even if the amount claimed were fifty dollars, when under the practice at the time of the last Constitution the limit was in these courts placed at twenty-five dollars. Ten years later, the jurisdiction of the justices' courts in all actions cognizable therein was extended to one hundred dollars.¹ By an amendment to section 53 of the Code in that State, the jurisdiction was further extended to two hundred dollars.² The jurisdiction has in like manner been extended in Connecticut, Ohio, Pennsylvania, and New Jersey, and other States.³

Now the question arises, had the legislature a right, even without express constitutional power, to extend this jurisdiction? It is denied in some places. For it is argued, if this right can properly be exercised by the legislature, it has power to transfer a large class of cases from courts in which a jury trial can be had, to courts of local jurisdiction where there is no jury, or a jury of limited number unknown to the common law; and that in exercising a power like this, it is competent for the legislature practically to abridge, or abolish the right altogether, in certain classes of cases. Further, it is claimed that if a jury of six can be made a lawful jury in such courts, why not one of a less number, a jury of three, two, or even one.

This power in the legislature was doubted by Elmer, J., in *State v. Zeigler*,⁴ and in *Baxter v. Putney*,⁵ in a New York court. But it has been lately held in two cases in the latter State, that such an exercise of power in the legislature was not unconstitutional, that it had been several times exercised, and that subsequent Constitutions not having forbidden such an exercise of power, must be presumed to have sanctioned it.⁶

¹ Laws N. Y. 1840, p. 265.

² Laws 1861, c. 158.

³ *Curtis v. Gill*, 34 Conn. 55; *Guile v. Brown*, 38 Conn. 237; *Norton v. McLeary*, 8 Ohio N. S. 205; *Emerick v. Harris*, 1 Binn. 416; *McGear v. Woodruff*, 4 Vroom, 213.

⁴ 3 Vroom (N. J.), 262.

⁵ 37 How. Pr. 140.

⁶ *Dawson v. Horan*, 51 Barb. 459; *Knight v. Campbell*, 62 Barb. 16. See *People v. Lane*, 6 Abb. Pr. N. S. 105.

The same doctrine is held in Ohio, where it is said that "had it been thought expedient to prescribe by constitutional enactment the limits of jurisdiction to be conferred on justices of the peace, it would probably have been done by direct and express provision."¹ The same is held in Pennsylvania, New Jersey, and Connecticut.² In a late case in the last State, the reasons on which the exercise of such a right was held lawful, were clearly stated in *Guile v. Brown*.³ "It seems more reasonable," says the court, "and more in harmony with the purposes and spirit of that instrument (the Constitution), to interpret it as saying, in effect, that the legislature may, in conformity to established usage, to a certain extent change from time to time, as the business interests of the State may require, the limit below which the State shall not be required to provide for a jury trial."

Unquestionably this seems to be the best doctrine to establish. The limits of legislative action ought not to be so circumscribed and defined by a Constitution as to preclude all exercise of a power to increase the jurisdiction of an inferior court, as expediency or the interests of the people may require. There must manifestly be a discretionary power given to legislative bodies to regulate many questions which cannot be definitely described, limited, or controlled by constitutional provisions. A Constitution is only changed or modified at long intervals, and in the mean time there may arise a necessity to alter the procedure and the jurisdiction of local courts, either to relieve the higher courts, or to more speedily and easily decide litigated claims of a relatively unimportant character. To argue that it is unsafe to intrust a legislative body with such a discretionary power, is to exhibit an unreasonable distrust of the action of such a body not justified by its character in this country.

¹ *Norton v. McLeary*, 8 Ohio N. S. 203.

² *Emerick v. Harris*, 1 Binn. 416; *Johnson v. Barclay*, 1 Harr. 1; *Curtis v. Gill*, 34 Conn. 55.

³ 38 Conn. 242. Some States fix the amount by a constitutional provision, of the jurisdiction in these inferior courts. In New Hampshire it is fixed at fifty dollars, and a jury of six men is given. Art 1, § 7. In the States of Arkansas, Minnesota, and Wisconsin, the right is given in all civil cases, no matter what the amount is. Ark. art. 1, § 6; Minn. art. 1, § 4; Wis. art. 1, § 5. In New Jersey, art. 1, § 7, the limit is fifty dollars. In Michigan, art. 6, § 18, the exclusive jurisdiction is given to one hundred dollars.

§ 101. The right is not denied, if a right of appeal be given to another court in which a trial by jury is given.

In many of the cases where the jurisdiction of inferior courts has been increased, it has been held that there is no violation of the constitutional guarantee, if the jurisdiction of an inferior court, wherein there is no jury trial, be increased, and a right of appeal be given to another tribunal where a trial can be had with a jury.¹ And the same doctrine has generally been held, even if the statute require a bond or bail with surety on the appeal to pay costs and a jury fee.² But, on the contrary, it has been held in Minnesota, that such a statute requiring surety was invalid, the court expressly stating, however, that if the right of appeal had been made absolute and unrestricted, the constitutional guarantee would not have been violated.³ But this restriction is only denied in criminal actions, for in another case in a civil suit, it was held not to be unconstitutional to require a party who demands a jury trial to advance a reasonable jury fee;⁴ and the same principle is held in Michigan.⁵

§ 102. The right must not be restricted by conditions which would practically impair or render it unavailing. While it is decided to be reasonable in civil cases to require a bond for the prosecution of an appeal to a jury, or to pay costs, or to prepay the jurors' fees in the first instance, when a jury is demanded; the same restrictions are not permitted in criminal cases.⁶ Hence, a statute requiring a court upon an appeal in a criminal case to impose a penalty in case of conviction in double

¹ *State v. Beneke*, 9 Iowa, 203; *State v. Brennan's Liquors*, 25 Conn. 278; *Gaston v. Babcock*, 6 Wis. 503; *Jones v. Robbins*, 8 Gray, 329; *Beers v. Beers*, 4 Conn. 535; *Biddle v. Commonwealth*, 13 S. & R. 405; *Keddie v. Moore* 2 Murph. 41; *Wilson v. Simonton*, 1 Hawks, 482; *Head v. Hughes*, 1 Marsh. 372; *Haines v. Levin*, 51 Penn. St. 412; *Bryan v. State*, 4 Iowa, 349; *Norristown, &c. Co. v. Burkett*, 26 Ind. 53.

² *Hapgood v. Doherty*, 8 Gray, 373; *Morford v. Barnes*, 8 Yerg. 444; *Stewart v. Mayor*, 7 Md. 500; *Randall v. Kehler*, 60 Maine, 37; *McDonald v. Schell*, 6 S. & R. 240; *Flint River Steamboat Co. v. Foster*, 5 Geo. 194.

³ *State v. Everett*, 14 Minn. 439.

⁴ *Adams v. Corrison*, 7 Minn. 456.

⁵ *People v. Hoffman*, 3 Mich. 248.

⁶ *Saco v. Wentworth*, 37 Maine, 165; *Greene v. Briggs*, 1 Curtis C. C. 311; *People v. Carroll*, 3 Parker Cr. R. 22.

the amount imposed by the court below, is, in that respect, unconstitutional.¹ But even in civil cases the right must not be so clogged with such onerous conditions as to prevent a person obtaining it except with great difficulty. The principle was clearly stated in *Flint River Steamboat Co. v. Foster*,² that an act of the legislature clogging the right of trial by jury will not be pronounced unconstitutional unless it totally prostrates the right, or renders it wholly unavailing to a party for his protection. So a statute that requires that the court shall render judgment against the sureties on an injunction bond, on the dissolution of an injunction, or against the sureties for the prosecution of an appeal, on the affirmance of a judgment, is unconstitutional.³

§ 103. **Right in Proceedings for Contempt.**—It has always been conceded that courts should be invested with the necessary authority to enforce order in their proceedings, to compel the execution of their orders or decrees, and to enforce obedience and respect on their officers; and for this purpose they are empowered to deprive a person, by imprisonment for a short period, of his liberty, even without the judgment of his peers. Thus, a court has power to imprison and punish a sheriff in this summary way for not obeying its process or orders, because the sheriff is an officer of the court, and amenable to its orders.⁴ And in proceedings to enforce an execution, they are also empowered to punish a party, and commit him to prison without a trial by jury.⁵ While this power exists without question in all courts, it must be exercised judiciously; its exercise is not to be upheld except under the circumstances and in the manner prescribed by law.⁶

This right cannot be exercised by judicial officers who do not act in a court of record, except when the contempt is in the immediate presence of the court; it does not extend below

¹ *State v. Gurney*, 37 Maine, 156; *Lord v. State*, 37 Ibid. 177.

² 5 Geo. 194.

³ *Hughes v. Hughes*, 4 Monr. 43; *Littlefield v. Peckham*, 1 R. I. 500.

⁴ *Lewis v. Garrett's Admr.* 5 How. (Miss) 434; *Wells v. Caldwell*, 1 Marshall, 442.

⁵ *Ex parte Grace*, 12 Iowa, 208; *People v. Cowles*, 3 Abb. (N. Y.) App. Dec. 507.

⁶ *Batchelder v. Moore*, 42 Cal. 412; *Howard v. Durand*, 36 Geo. 346

courts of record recognized by the common law.¹ An attorney at law, against whom charges have been preferred for malconduct in office, is not entitled to have a jury trial.²

§ 104. The right does not exist under proceedings of eminent domain, unless it is expressly given by a provision in the Constitution, which is the case in some of our States. So long as the Constitution gives the right as it before existed, a party cannot claim a jury trial in proceedings by the State in the way of eminent domain, unless the right existed and was previously observed before in the State, at the time of the adoption of the Constitution. This is the language of the court in *Pennsylvania R. R. Co. v. Lutheran Congregation*:³ "Indeed, the right of trial by jury has never been held to belong to the citizen himself in proceedings by the State under her powers of eminent domain." In a case in Texas,⁴ it was held that the reason the right was denied was because it was not a suit in a court of justice for the trial of an issue of fact either in a civil or criminal case; and it has been held in these cases that the State can delegate its power to railroad corporations for this purpose, and still the right cannot be claimed, provided there is some mode pointed out for making compensation.

While this is the generally received doctrine, it is not universally accepted. Thus, in Indiana the constitutional clause is, "In all civil cases the right of trial by jury shall remain inviolate;" and it was there held that in a proceeding by a railroad company to appropriate land by way of eminent domain, the citizen, on appeal to the Circuit Court, had a right to a jury, as this right was one given in the State before the adoption of the Constitution.⁵ In *Campan v. City of Detroit*,⁶ it was held

¹ *Matter of Kerrigan*, 4 Vroom (N. J.), 344; *State v. Galloway*, 5 Cold. (Tenn.) 326; *Ex parte Smith*, 28 Ind. 47.

² *Baker v. Gordon*, 23 Ind. 204; *Ex parte Robinson*, 3 Ind. 52. Tampering with a juror is a contempt of court which a court can punish. *State v. Doty*, 3 Vroom (N. J.), 403.

³ 53 Penn. St. 445.

⁴ *Buffalo Bayou, &c. R. R. Co. v. Ferris*, 26 Tex. 588. See *Des Moines v. Layman*, 21 Iowa, 153; *Heyneman v. Blake*, 19 Cal. 579; *People v. Smith*, 21 N. Y. 595; *Drainage case*, 6 Vroom (N. J.), 497; *Beekman v. Saratoga, &c. R. R. Co.* 3 Paige, 45; *Backus v. Lebanon*, 11 N. H. 19.

⁵ *Lake Erie, &c. R. R. Co. v. Heath*, 9 Ind. 558, and cases cited.

⁶ 14 Mich. 276.

that when the Constitution required a jury of twelve men to assess damages when property was taken for the use and benefit of the public, and the legislature passed an act limiting the jury to six, in street openings, that such act was unconstitutional, and that an ordinance of the common council appropriating property for the opening of a street was an exercise of the power in the Constitution, the taking of private property for the use and benefit of the public.

§ 105. **When the Right exists generally.** — Having now considered the cases and circumstances in which this right is not granted, it is easily determined when it cannot be denied, when it is a constitutional right. It has been shown that the right is by no means so extensive as is popularly or commonly supposed; that in many cases a person may be deprived of property, may be subjected to hardship and imprisonment without the intervention of a jury; but never can he be subject to capital punishment, or any punishment which would render him infamous, which might affix to him the ignominy of a criminal, and deprive him of his political rights as a citizen, without a trial by jury.

In civil proceedings, if a general rule be possible, we may say, that in all suits at common law, above a certain fixed sum deemed relatively small or unimportant, the jurisdiction of which is given to inferior courts, a person can claim a right to a trial by jury — a common law jury with its essential attributes of number and unanimity, of which he cannot be deprived except by the sovereign power of the people in their collective capacity in a constitutional enactment, or by waiving his right to it.

§ 106. **The right may be regulated by the legislature in certain ways provided its fundamental requisites are not impaired or destroyed; that is, provided its number and unanimity, and we should say its impartiality, are not violated. These are necessary for its integrity; impliedly if not expressly fixed by the Constitution.¹ Excepting in these particu-**

¹ "The right which is thus secured by constitutional guarantee, must in its nature be subject to legislative control, to an extent perhaps not easily definable in advance." Bishop, *Crim. Proceed.* § 759.

lars, it is within the power of the legislature to determine at what times, by what officers, in what manner, and from what class the jury shall be selected, provided it is not a biased or prejudiced one.¹ Indeed, it is evident there must be many practical details requiring legislative interference and regulation. Thus, what exceptions shall be allowed against jurors, what restraints shall be imposed on them, what freedom on their part tolerated, are matters that must be left to the regulation of temporary laws. Thus, in a late case in New York² it was decided to be within the power of the legislature to make such changes in the law respecting the mode of procuring and impanelling a jury as it may deem expedient, limited only by the constitutional obligation to preserve the right of trial by an impartial jury. And the legislature may limit the number of peremptory challenges, even in capital cases, without infringing on the constitutional right; for this right is to have twelve free and lawful men who are impartial between either party, who will by an unanimous verdict find the truth of the issue, and any legislation, therefore, which merely points out the mode of arriving at this object, but does not rob it of any of its essential ingredients, cannot be considered an infringement of the right.³ Neither is the right infringed by allowing the State half the number of peremptory challenges allowed the prisoner, even if this be more than the prosecution was entitled to before.⁴

§ 107. *Right as impaired by a Nonsuit.* — Whether the court or legislature has power to direct a nonsuit in case the plaintiff fails to make out a cause of action, or to establish a *prima facie* case, after a jury has been impanelled, is another inquiry upon which decisions differ. It is evident that, in intrusting a power of this sort either to the court or the legislature, a jury trial will in many cases be denied, even when it is demanded; and in this manner it might be contended that the right would be impaired. Because of this

¹ Byrd's case, 1 How. (Miss.) 163.

² Stokes v. People, 53 N. Y. 764, and see People ex rel. Tweed v. Liscomb, 10 Hun. (N. Y.) 760; Rafe v. State, 11 Geo. 60.

³ Dowling v. State, 5 Smed. & M. 664.

⁴ Jones v. State, 1 Kelly (Geo.), 610; Hudgins v. State, 2 Ibid. 173; Warren v. Commonwealth, 1 Wright, 44; Hartzell v. Commonwealth, 4 Wright, 463.

danger, and to take away any opportunity or power to control or restrict the right, such a power has been denied either to the court or the legislature.

The English practice was, that when the plaintiff had produced his evidence and had rested, the court might give its opinion that the evidence failed to make out a case, and that the plaintiff should be nonsuited; but that if the plaintiff insisted on the case being submitted to a jury, his right could not be denied.¹ Then if a verdict were given against him, as would generally be the case, he could not thereafter bring a new action on the same cause.

Following this practice, the United States Supreme Court has held that the court has no authority to order a peremptory nonsuit against the will of the plaintiff; he may agree to a nonsuit, but cannot be compelled to submit to it.² And the same is the doctrine held in the courts of Massachusetts, Pennsylvania, Tennessee, and Virginia;³ and in Alabama the right is denied to the court unless directed by statute.⁴

However this may be in conformity with the English doctrine, it is certain that in a large number of our States, the right of the court to order a nonsuit, when the plaintiff has produced his evidence and failed to offer sufficient proof to make out his cause of action, is constantly exercised and upheld. The principle is well established in legal investigation, that the court is to decide upon the law, the jury upon the facts; and acting upon this principle, it would seem to be within the province of the court, when the plaintiff's evidence is submitted, and not controverted by the defendant, to decide on the sufficiency of the evidence, and to order a nonsuit when the evidence has failed to give the plaintiff a right to recover.

¹ 2 Broom & Hadley's Com. 264; Starkie on Evid. § 806; *Watkins v. Towers*, 2 T. R. 281; *Dewar v. Purday*, 3 Ad. & E. 166.

² *Doe v. Grymes*, 1 Pet. 469; *D'Wolf v. Rabaud*, 1 Pet. 476.

³ *Mitchell v. New Eng. M. Ins. Co.* 6 Pick. 117; *Girard v. Gettig*, 2 Binn. 234; *Widdifield v. Widdifield*, 2 Binn. 245; *Irving v. Taggart*, 1 S. & R. 360; *Hayes v. Greene*, 4 Binn. 84; *Scruggs v. Brackin*, 4 Yerg. 528; *Thweat v. Finch*, 1 Wash. 219.

⁴ *Smith v. Seaton*, Minor, 75; *Phillips v. Jordan*, 5 Stew. 42. In Mississippi a compulsory nonsuit is not allowed. *Ewing v. Glidwell*, 3 How. 332; *Winston v. Miller*, 12 S. & M. 550. Not in Missouri. *Clark v. Hannibal, &c. R. R. Co.* 36 Mo. 202. Nor in Indiana. *Williams v. Port*, 9 Ind. 551.

If the discretion or power of the court be wrongly exercised in this respect, there is a means of redress in an appeal, when a new trial may be ordered. In New York this doctrine is held, and the court said: "This must be a power vested in the court. It results, necessarily, from their being made the judges of the law of the case when no facts are in dispute."¹ This view is also held in South Carolina and in Maine.² In Connecticut the power of the court has been strictly and clearly upheld in this respect, and it was there said: "There is no question, in our view of the Constitution, that the legislature could properly authorize a court to nonsuit the plaintiff upon the defendant's motion. The clause in the Constitution, which provides that the trial by jury shall remain inviolate, presents no obstacle to this legislation. Its object is simply to preserve a jury trial in questions of fact, and it does not relate to questions of law with the court. The jury have nothing to do with the relevancy and materiality of evidence, nor with inferences of law from facts fully established or not denied."³

§ 108. Right as impaired by Committals to Reform Schools. — It has been a well recognized doctrine, that a court of chancery was invested with a supervisory power in the character of a *parens patriæ*, over the morals, education, and maintenance of infants. This power has been for a long time exercised, acquiesced in, and acknowledged as a salutary and judicious exercise of the general jurisdiction of a court of chancery, and one that is highly beneficial for the interests of the State as well as the welfare of the individual.⁴ In the exercise of this power, it has been held to be proper for the court to remove children from the custody of parents and guardians who were manifestly too corrupt and unfit to have charge of them; that it had a right to interfere to see that the infant had a suitable maintenance and education; and for this pur-

¹ Pratt v. Hull, 13 Johns. 334; Stuart v. Simpson, 1 Wend. 376; Clements v. Benjamin, 12 Johns. 299.

² Brown v. Frost, 2 Bay, 126; McGrath v. Isaacs, 2 McCord, 26; Perley v. Little, 3 Greenleaf, 971. In Ohio the court has power to order peremptory nonsuit. Ellis v. Ohio Life, &c. Co. 4 Ohio N. S. 628. And in New Hampshire. Bailey v. Kimball, 26 N. H. 351.

³ Naugatuck R. R. Co. v. Waterbury B. Co. 24 Conn. 468.

⁴ Story Eq. § 1341.

pose to compel the attendance of the child at an educational institution, in case of a disregard or neglect of its education.

It is by reason of this salutary power, which has so long been conceded to a court of chancery, that our courts are warranted in committing minors of vicious habits and tendencies, and neglected education, after due examination, to reform and industrial schools; and such an exercise of power is held not to violate the constitutional right of a trial by jury. Thus, in Ohio a statute authorizing commitments of minors under the age of sixteen to the "State Reform Farm," if evidence of crime be found against them by a grand jury sufficient to put them on their trial, was held constitutional;¹ and a similar statute in Pennsylvania, authorizing the commitments of infants to the house of refuge, was held valid.² But there is evidently a limit to this power; for it is only properly exercised in the case of minors; and therefore after the attainment of majority, it should not be further exercised. The power to commit, even minors, has been denied in Illinois, on the ground that it is an infringement of the constitutional right guaranteeing a right of trial by jury to *every person*, before he can be legally deprived of his liberty as a punishment for crime.³

§ 109. Object and Importance of these Schools. — It is to be regretted, in view of the general establishment of such schools, both here and in England, that this decision was made in Illinois, as it serves as a precedent whenever an attack is made upon these schools. During the last quarter of a century nothing has so much characterized criminal legislation as the adoption and practice of remedial and preventive means. And this is particularly observed in the treatment of criminals of a youthful age, for whose future welfare society is more responsible. Recognizing this duty the state owes to itself, and for the individual welfare, institutions for the education and reform of juvenile criminals have been liberally established in England, and are now in existence in no less than sixteen of our States. They have, in the language of the statutes providing for them, been established for the purpose of "instruct-

¹ Prescott v. State, 19 Ohio N. S. 184.

² Ex parte Crouse, 4 Whart. 11.

³ People v. Turner, 55 Ill. 280.

ing, employing, and reforming juvenile offenders ;” and except in a single instance, these schools have nowhere been condemned as encroaching on the constitutional rights, or intrusting the State with arbitrary and oppressive powers. The question has been justly presented lately to the Supreme Court of California,¹ as to the constitutionality of the act of 1858, empowering the police judge, after an examination, to commit minors to the industrial school. The question came before the court on a *habeas corpus* in reference to one Ah Peen, a Chinese minor, committed under this act. It was claimed on the part of the minor that the proceedings resulting in his detention were contrary to art. 1, § 3 of the Constitution, which provides that “the right of trial by jury shall be secured to all,” and also to the eighth section of the same article, which provides that “no person shall be deprived of his liberty without due process of law.” The court, consisting of five members, held the act to be constitutional, refusing to recognize the Illinois case, and quoting, with approbation, the cases in Pennsylvania and Ohio. They say, “The purpose in view is not punishment for offences done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. Having been abandoned by his parents, the State, as *parens patriæ*, has succeeded to his control, and stands *in loco parentis* to him. The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are by reason of infancy, lunacy, or otherwise, incapable of properly controlling themselves.”

§ 110. **Waiver of Right.** — It is a general rule that a party may relinquish or waive a legal right, so long as such a relinquishment or waiver merely affects his own interests. Hence, it has been held that it is competent for a party to waive his right to a trial by jury and submit his case to the decision of the court. It was stated in a case in Mississippi,² that the Constitution only secured the *right* to a party, but did not, nor was

¹ Ex parte Ah Peen. Decision rendered Feb. 21, 1876.

² Lewis v. Garrett's Admr. 5 How. 434.

it intended to, secure the actual trial, and that therefore, in a civil case, the right could be waived by a party. The practice of waiving a person's legal rights was one so well known and established, that it was conceived there could be no objection to the waiver of such a right in the case of a jury trial. But many questioned the wisdom of permitting a party to waive such a right, even in his own behalf; for it was claimed the jury is a part of the administration of law, as much inherent to the court as any part of the tribunal, and that if a party were permitted to dispense with a jury in a case where the jury had always been a matter of right, it was in reality constituting another tribunal than that established by law; and that he might as well set up another court for his trial other than that established by law. Besides, the practice of dispensing with a jury trial has a tendency to disassociate its utility from the minds of the people, and to bring the institution into disuse. These views had their effect, so that it was held that the right could not be waived unless under a constitutional or legislative provision.

§ 111. *Waiver in Civil Cases.* — However these views may have been held, and whatever force there may be in their reasons, it is a fact that in this country for a long time the practice has become general, to permit a party to waive his constitutional right in civil cases. In England the right of waiver is given by various recent acts in civil cases; and it is said the parties, in a large majority of cases, prefer the decision by the court to a verdict by a jury.

The Supreme Court decided that, independent of any legislative or constitutional provisions, parties can submit their case to the court on an agreed statement of facts, and waive a trial by jury.¹ It is said in *State v. Cox*,² "By a jury, I understand a jury of twelve men, and of no greater or less number, for the trial of any traverse. The accused may waive his right designed for his own protection."

Nevertheless, to avoid any doubt of the right of a party in a civil suit to waive the right, a majority of our Constitutions have provided that a party can waive the right; and in many

¹ *Henderson's Distilled Spirits*, 14 Wall. 44.

² 8 Ark. 439.

it is to be waived only in the mode prescribed by statute. Hence, it cannot be waived in any other. Thus, in Indiana it can only be waived in three ways: 1. By failing to appear at the trial; 2. By written consent in person, or by attorney, filed with the clerk; 3. By oral consent in open court, entered on the record.¹

§ 112. *When waived.* — Where there is no prescribed mode in which a jury trial may be waived, it becomes an important inquiry as to when, and by what acts, the right may be considered as waived. We should say, in general, a person who proceeds to trial without demanding the right, or complying with some prescribed mode to signify his demand, unequivocally manifests a waiver of his right;² thus, an attorney of a party being present when a cause was referred to a master, and appearing before the latter without an objection, waives a jury trial.³ And where defendant objected to going on with the case, and took no further action in it except to watch the progress, and the clerk's entry was, "Neither party requiring a jury — cause submitted to the court," this was held to be a sufficient waiver.⁴ Under the California practice act, providing "that if the demurrer be disallowed, the court shall permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; if he do not plead, judgment shall be pronounced against him," and where the party did not plead, judgment being therefore pronounced, it was held the right was waived.⁵

When the record shows that the accused "did not demand a jury," it sufficiently shows a waiver of trial by jury;⁶ and when a party suffers the case to be tried by the court until the issues are found against him, he waives any right he may have had to jury trial;⁷ and in such case the findings of the court on matters of fact in issue between the parties cannot be re-

¹ *Shaw v. Kent*, 11 Ind. 80.

² *Flint River Steamboat Co. v. Foster*, 5 Geo. 194.

³ *Hauser v. Roth*, 37 Ind. 89.

⁴ *Tower v. Moore*, 52 Mo. 118.

⁵ *People v. King*, 28 Cal. 265.

⁶ *Dailey v. State*, 4 Ohio N. S. 57.

⁷ *Ellithorpe v. Buck*, 17 Ohio N. S. 72.

viewed on error.¹ In Massachusetts, a party electing to proceed in equity, instead of at law, to recover usurious interest, does not thereby waive his right to ask for a trial by jury.²

§ 113. **Waiver in Criminal Cases.** — In criminal cases the right is more jealously guarded, and the right of waiver more strictly limited. It is observed that the constitutional provisions do not concede the right to waive the jury in criminal cases; for it is deemed, in such cases, there are more than personal interests involved, that the rights and interests of the public are also concerned. Hence, the right of waiver is denied in criminal cases.³ Thus, it is held in Michigan "that it is incompetent for a defendant to waive his constitutional right of a trial by twelve men, and it is the duty of the courts to see that the constitutional rights of a defendant in a criminal case should not be violated, however negligent he may be in raising the objection."⁴ A person charged in the recorder's court with an offence against the general laws of the State cannot waive his right to a trial by jury.⁵

With regard to capital cases and graver crimes, it is generally held that the defendant cannot waive his right nor consent to be tried by a less number than twelve,⁶ but in other places it is held that in crimes of lesser grade there can be a waiver. In Indiana, by statute the defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases; all other trials must be by jury.⁷ But this is quite exceptional. In that State the waiver is very strictly guarded. Thus, in a criminal case the attorney of the defendant waived a trial by a jury of twelve men, and consented to a trial by a less number. The defendant, though present in court, was not consulted and did not know that he could object to the act of the attorney. It was held that such

¹ *Gest v. Kenner*, 7 Ohio N. S. 75.

² *Ward v. Hill*, 4 Gray, 593.

³ *Whallon v. Bancroft*, 4 Minn. 109.

⁴ *Hill v. People*, 16 Mich. 351.

⁵ *People v. Smith*, 9 Mich. 193.

⁶ *Cancemi v. People*, 18 N. Y. 128; *People v. O'Neil*, 48 Cal. 257; *Carpenter v. State*, 4 How. (Miss.) 163; *Bell v. State*, 44 Ala. 393; *Jackson v. State*, 6 Blackf. 461; *Rowles v. State*, 5 Sneed, 360.

⁷ 2 R. S. (C. & H.) 409.

a waiver was not binding on the defendant.¹ It is to be observed that in the Indiana Constitution there is no provision expressly authorizing a waiver in civil cases; and this fact may account for the power of the legislature in permitting the waiver in criminal cases, except in capital crimes. This is conceived to be the general rule, that in criminal cases, except in such as had previously been tried before a justice, or a jury of six men, the defendant is not permitted to waive his constitutional privilege, nor to consent to be tried by a less number than twelve.² In some places a defendant is permitted to waive the right in trials for misdemeanors, but not in trials for a higher grade of crime.³

¹ *Brown v. State*, 16 Ind. 496.

² *Wilson v. State*, 6 Ark. 601; *State v. Mansfield*, 41 Mo. 470; *Williams v. State*, 12 Ohio N. S. 622.

³ *Commonwealth v. Dailey*, 12 Cush. 80; *Murphy v. Commonwealth*, 2 Metc. (Ky.) 365.

In Virginia, by an act passed in 1871, c. 57, § 38, it is provided: "In any case except a case of felony or misdemeanor, unless one of the parties demand that the case be tried by a jury, the whole matter of law and fact may be heard and determined, and judgment given by the court; and by consent of parties entered of record, the jury may consist of seven, and in that case a verdict shall be as valid, and have the same effect, as if it had been found by a jury of twelve. And in any civil case in which the consent of the plaintiff and defendant shall be entered of record, it shall be lawful for the plaintiff to select one person, who shall be eligible as a juror, and for the defendant to select another, and for the two persons so selected to select a third of like qualifications, and the three so selected shall be considered a jury in the case, shall take the oath required of jurors, and shall hear and determine the issue, and any two concurring, shall render a verdict, under the instructions of the court, in like manner, and to the like effect as a jury of twelve."

CHAPTER IV.

JURY : HOW SELECTED AND SUMMONED.

- § 114. Importance of Careful Selection.
- § 115. Qualifications : Property.
- § 116. As to Political Status.
- § 117. As to Character.
- § 118. As to Mental and Physical Condition.
- § 119. Exemptions.
- § 120. Right to exempt.
- § 121. Selection : How made.
- § 122. Made by Supervisors.
- § 123. Made by Court or Judge.
- § 124. Made by Commissioners.
- § 125. Failures to comply with Statutory Regulations.
- § 126. Lists required to be filed.
- § 127. Drawing the Panel.
- § 128. Drawing in certain other States.
- § 129. Officer drawing the Panel.
- § 130. Mistakes and Omissions in Drawing.
- § 131. Summoning Jurors : in England.
- § 132. The Venire.
- § 133. Mistakes and Omissions in.
- § 134. Venire to whom directed.
- § 135. Proper Officer must summon.
- § 136. Return of the Venire.
- § 137. Number returned.
- § 138. Special Venire.
- § 139. Excusing or discharging Jurors.
- § 140. The Court may discharge a Juror.
- § 141. Talesmen.
- § 142. They are summoned to supply a Deficiency.
- § 143. Number summoned.
- § 144. The Qualifications of Talesmen.

§ 114. Importance of Careful Selection. — The selection of the jury, it is obvious, requires careful discrimination and precaution. The efficiency and safeguards of the body as a part of the administration of justice very materially depend upon a proper and careful selection of jurors ; and the greatest abuses of the system, and the complaints made against it, are based not so much on the nature and functions of the body,

as upon the character of the class sometimes composing it. Among other remedies demanded in the Bill of Rights, passed in the first year of William and Mary, it was required "that jurors ought to be duly impanelled and returned, and jurors which pass upon men for high treason ought to be freeholders."¹

In this are pointed out two abuses which have always weakened and undermined the integrity of the body, and against which we have had to make stringent and special provisions. These were the improper selection from the body of the people, and an unfair impanelling of those selected. In our statutory regulations on this subject, we have carefully provided against these abuses by specific directions as regards the class from whom the jury are to be taken, the officers who are to make the selection, the manner and time of making it, the time and manner of summoning those selected, and the method of forming the jury from those thus summoned.

The English practice allowed the officer summoning a jury a large, and, as we think, a dangerous degree of discretion as to the selection of the persons who formed the jury. This gave rise to the very common and grievous complaint so frequently made in English judicial proceedings of a *packed jury*, which under the system there was possible; and the evils and dangers of which have been so forcibly pointed out by writers, especially by Bentham in his *Art of Packing Juries*.

In the limits of the present chapter we shall inquire particularly as to the qualifications of those selected to serve as jurors, the manner in which this selection is made, and the mode in which they are summoned to the court.

§ 115. *Qualifications.* — The qualifications of jurors may be determined in reference to property, political status, character, mental and physical condition. At an early period it was required here that a juror should be possessed of some property as a qualification, as it is at present under the statute 6 Geo. IV. in England. It was believed, and very properly so, that a better and more judicious selection could be made from those who had some property at stake in the community, as such would more likely be circumspect to protect the rights

¹ 1 Wm. & M. c. 36.

both of person and property. But lately the tendency is to dispense with a property qualification, and to make the selection from citizens who are qualified voters, if in other respects qualified. Thus, in Mississippi a property qualification was formerly required;¹ but the Constitution of 1870² provided that "no property qualification shall ever be required of any person to become a juror," and under this it was decided that the jury should no longer be restricted to a class possessing property of a certain value.³ So, in Connecticut a property qualification was formerly required, but since 1837 a freehold qualification is dispensed with in talesmen as well as other jurors.⁴ Up to 1867, in Alabama, the list of jurors was taken biennially from householders and freeholders; but by an act passed in 1868,⁵ the list is to be taken from the registered voters. A property qualification is still required in California;⁶ Indiana, where the jurors are to be "reputable male householders;"⁷ Kansas, where they are to be selected from "those assessed on the assessment roll of the previous year having qualifications of electors;"⁸ Michigan, from persons assessed on the assessment roll having the qualification of electors;⁹ New Jersey, from those having a freehold in lands, messuages, or tenements in the county for which they shall be returned;¹⁰ New York, where it is required they shall be assessed for personal property in their own right to the amount of \$250, or they shall have a freehold estate in real property in the county belonging to them in their own right, or in the right of their wives, to the value of \$150;¹¹ except in the city of New York, where a

¹ Byrd's case, 1 How. 163.

² Art. 1, § 13.

³ *Head v. State*, 44 Miss. 731.

⁴ *Ladd v. Prentice*, 14 Conn. 109.

⁵ No. 218, Laws 1868.

⁶ Code Proc. § 198. See *People v. Thompson*, 34 Cal. 671.

⁷ 2 Rev. St. (G. & H.) 30.

⁸ Gen. Stat. (1868) p. 534.

⁹ Comp. Laws (1871), § 5978.

¹⁰ *Nixon's Dig.* p. 447.

¹¹ 2 Rev. Stat. 411, § 13. Under this it was held that where at the time a juror was put on the list he was a freeholder, owning a farm for which he was assessed, but was not assessed for personal property, and before the trial he sold his farm, taking back a mortgage for the purchase money, but was not at the time of trial assessed for personal property, he was not qualified, and was properly discharged on challenge. *Kelley v. People*, 55 N. Y. 565.

qualification of real estate is not necessary;¹ in North Carolina, where they are required to be freeholders;² Oregon, where the list is taken from the assessment roll of the county;³ Pennsylvania, from the taxable citizens of the county;⁴ Tennessee, from freeholders or householders;⁵ Texas, from qualified electors or freeholders in the State or householders in the county;⁶ and in Rhode Island, from persons qualified to vote upon any proposition to impose a tax, or for the expenditure of money in any town.⁷ There are, therefore, about a third of our States which require a property qualification for a juror.

Jurors to serve in courts of the United States shall have the same qualifications as jurors of the highest court in the State where the court is held.⁸

Under the statutes of Indiana, a freeholder merely is not competent to sit upon a petit jury; he must be a householder;⁹ and if a party accept a juror without interrogating him in reference to whether he is a freeholder or householder, he thereby waives the right to object to the competency of the juror on such grounds.¹⁰ If the record state the jurors to be householders of the county, their residence therein is sufficiently shown.¹¹

§ 116. Qualification as to Political Status. — It is necessary that a juror should be a citizen of the State, a qualified elector, and that he has not forfeited any of his political rights by a conviction for crime. Alienage, therefore, is good ground for the exclusion of a person from a jury.

In a case in Illinois it is held that an alien is not qualified to serve as a juror in any case.¹² It is not sufficient to disqualify a person to prove that he was born without the United States. It must be shown that he has not been naturalized,

¹ *Friery v. People*, 2 Abb. App. Dec. 215.

² Rev. Code (1855), p. 161.

³ Gen. Laws (1874), § 921.

⁴ Purdon's Dig. p. 579.

⁵ Rev. Stat. (1871) § 4002.

⁶ Paschall's Dig. § 3975.

⁷ Gen. Stat. (1872) p. 430.

⁸ U. S. Rev. Stat. § 800; *United States v. Tallman*, 10 Blatch. 21.

⁹ *Bradford v. State*, 15 Ind. 347.

¹⁰ *Estep v. Waterous*, 45 Ind. 140.

¹¹ *Hudson v. State*, 1 Blackf. 317.

¹² *Guykowaki v. People*, 1 Scam. 476.

which may be by his own oath, or by evidence.¹ In a civil case, an alien sworn on the jury, if unknown until after verdict, will not render it invalid.² It is held in a case in Wisconsin, that it is too late after the verdict, even in a criminal case not capital;³ but in another place it is held that in the trial for a felony, it would vitiate the judgment.⁴ Where jurors are required to be electors, it is not necessary in some States that their names be registered.⁵

The enfranchisement of a large portion of the citizens of the Southern States has led to an alteration in the qualifications of jurors; for in many, jurors were required to be *white* male citizens, and such is the designation in the statutes of Kentucky,⁶ Oregon,⁷ West Virginia,⁸ Missouri,⁹ Nebraska,¹⁰ at the present time. Up to 1871 the Virginia statute required jurors to be free white male persons, but by Act February 3, 1871, the word "white" was dropped.

The statute of Louisiana expressly provides that a qualified elector, without regard to *race*, color, or previous condition, shall be qualified to serve as a juror.¹¹ In Tennessee, though the word "white" is retained, yet by an act passed in 1868,¹² it is provided that "there shall be no disqualification for holding office, or sitting on juries, on account of race or color."

§ 117. *As to Character.* — The particular injunctions in our statutes regarding the character of those called on to serve as jurors, show the extreme importance attached to this qualification. It is repeatedly enjoined on selecting officers, that they choose honest, upright, and judicious men, as in the Alabama statute, "those competent to discharge the duties of grand

¹ *Jordan v. State*, 22 Geo. 545.

² *Brown v. La Crosse City, &c. Co.* 21 Wis. 51; *Hollingsworth v. Duane*, 4 Dall. 353.

³ *State v. Vogel*, 22 Wis. 471.

⁴ *Johr v. People*, 26 Mich. 427.

⁵ *State v. Squires*, 2 Nev. 226.

⁶ Gen. Stat. (1873) c. 62, art. 3, § 2.

⁷ Gen. Laws (1874), § 918.

⁸ Act March 12, 1873, c. 47.

⁹ *Wagner's Mo. Stat.* vol. 1, p. 797.

¹⁰ Gen. Stat. (1873) p. 642.

¹¹ Rev. Stat. (1870) § 2125.

¹² Chap. 31, § 1.

and petit jurors with honesty, impartiality, and intelligence, and who are esteemed in the community for their integrity, fair character, and sound judgment;"¹ and the Illinois statute directs those to be selected who are of "fair character, of approved integrity and sound judgment, and well-informed;"² and the same is the direction in the Michigan, Wisconsin, and New York statutes.³ In general, a conviction for a felony disqualifies a person as a juror. In some States a conviction for certain misdemeanors has the same effect, as in California and Oregon, where a conviction for a misdemeanor involving "moral turpitude" disqualifies.⁴ In Massachusetts the name of any person convicted of any "scandalous crime, or guilty of any gross immorality," is to be struck off the list of jurors;⁵ and the same direction is found in the statutes of Maine, Virginia, and West Virginia.⁶

The statute of Florida is more specific; it directs that those are to be excluded who have been "convicted of any bribery, forgery, perjury, or other high crimes, unless restored to civil rights."⁷

§ 118. *As to Mental and Physical Condition.* — Many of the statutes require a person to be well-informed and intelligent;⁸ and in some, it is further required that a person must be able to read and write the English language.⁹ Thus, in the city of New York, "no person shall serve as a juror unless he shall be an intelligent man, of sound mind, and good character, free from legal exception, and able to read and write the English language understandingly."¹⁰ Even without any statutory provision as to a juror being conversant with the English language, or the language in which the proceedings are held, it

¹ Laws 1868, No. 218.

² Rev. Stat. (1874), c. 78, § 2.

³ Comp. Laws (1871), § 5978; Stat. Wis. vol. 2, p. 1327 (Taylor's ed. 1871); New York, 2 R. S. 411, § 13.

⁴ Code of Proc. (Cal.) § 199; Gen. Laws Oregon (1874), § 918.

⁵ Gen. Stat. (1866) c. 132, § 9.

⁶ Maine Rev. Stat. tit. 9, c. 106, § 5; Laws Virginia (1871), c. 57, § 5; Code W. Virginia, c. 116, § 4.

⁷ Bush's Dig. (1872) p. 439.

⁸ Florida, Bush's Digest, p. 439; Georgia, Rev. Code, § 3940.

⁹ Illinois, Rev. Stat. c. 78, § 2; Michigan, Comp. Laws (1871), § 5978.

¹⁰ Laws 1870, c. 539, § 5.

would be held that one ignorant of the language is not qualified. It was held a good ground for granting a new trial, when a juror sat upon a trial who was ignorant of the English language.¹

But the court cannot establish an arbitrary standard; as where the court required that each juror should be able to read the Constitutions of the United States and of Georgia, and should be able to write, it was held that too much was required.²

In Texas it is required that a juror shall have "no defect of seeing, feeling, hearing, or *mental defect*;"³ and what this "mental defect" amounted to, was defined as embracing "such imbecility or such gross ignorance as practically disqualifies a person from performing his duties as a juror;" and the fact that the Constitution has made colored persons qualified jurors, secures them no exemption from the operation of the rule.⁴

The disqualification of age is also pointed out in our various statutes. In general, the ages between which jurors are called upon to serve are twenty-one and sixty. In one State, Maryland, a juror is not qualified until the age of twenty-five, and is exempted over the age of seventy.⁵ Seventy is the extreme age in a few States, as in Delaware, Maine, and in the city of New York, and sixty-five in Florida, Iowa, New Jersey, and Massachusetts. But the practical question in connection with the age of jurors, is whether a juror who has passed the limit, sixty, sixty-five, or seventy, can serve on a jury. It has been decided in such a case, that a juror is not rendered incompetent if he is older than the limit; that this is an exemption of which he can avail himself or not as he pleases; and a verdict will not be set aside if a person beyond the prescribed age sits on a jury.⁶

¹ *Lafayette, &c. Co. v. New Albany, &c. R. R. Co.* 13 Ind. 90; *Lyles v. State*, 41 Texas, 172.

² *Campbell v. State*, 48 Geo. 353.

³ *Paschal's Dig.* § 3040.

⁴ *Caldwell v. State*, 41 Texas, 86. The court may excuse a juror for deafness, without the prisoner's consent. *Jesse v. State*, 20 Geo. 156.

⁵ *Code*, vol. 1, pp. 350, 351. By statute of Westminster 2, c. 38, it is expressly provided, "that neither old men above the age of seventy years, nor persons perpetually sick, nor those who were infirm at the time of their summons, nor those who do not reside in the county, shall be put in juries, or in the lesser assizes." 2 Inst. 446.

⁶ *Munroe v. Brigham*, 19 Pick. 368; *Williams v. State*, 8 George (Miss.) 407; *Moore v. Cass*, 10 Kansas, 288.

But it may be inquired whether such a person can be challenged and excluded from sitting as a juror, even if he is willing and in other respects competent. In Illinois it is held to be ground of challenge, and also in Indiana.¹ In Mississippi it was held to be a cause for challenge;² but by the late Revised Code, a person over sixty, if he does not ask to be excused, is competent.³ We hold that when the statute exempts persons above a certain age, it is not a good ground of challenge to such persons if they do not claim the privilege of exemption, and if they are otherwise qualified. For it has been decided repeatedly that exemption is a personal privilege, and not a disqualification.⁴

§ 119. **Exemptions.** — There are certain persons either temporarily or permanently exempted from service on juries. Who these are the statutes of the various States point out; but in general there is a substantial agreement among them as to the persons or classes exempted. Thus, as an example, let us take from the statute of Alabama⁵ the list there given, and we shall find the same classes generally exempted. These are: professors and students in colleges, teachers and pupils in schools, clergymen in charge of churches; judges of the several courts; attorneys at law, while practising their profession;⁶ practising physicians; county commissioners of the United States; officers of the State government; sheriffs and their deputies; clerks of courts and coroners; justices of the peace and constables during their term of office; keepers of mills, ferries, and tolls; president, directors, and officers of incorporated banks; railroad officers; steamboat officers; members of fire companies; officers of the penitentiary; superintendent and physician of insane hospital and his assistants; and all mail contractors, mail agents, and public stage drivers. Telegraph

¹ *Murphy v. People*, 37 Ill. 447; *Davis v. People*, 19 Ill. 74; *State v. Miller*, 2 Blackf. 35.

² *Williams v. State*, 8 George, 176.

³ Rev. Code, art. 9, c. 8, § 724.

⁴ *Breeding v. State*, 11 Texas, 257; *State v. Wright*, 52 Maine, 328; *State v. Forshner*, 43 N. H. 89.

⁵ Rev. Code (1867), § 4064.

⁶ In Massachusetts it is held that attorneys, though retired from practice, are exempt. In *re Swett*, 20 Pick. 1.

operators, though not enumerated here, are generally excused;¹ and so are members of militia regiments.² And generally all over sixty years of age, in many States, sixty-five in some, and seventy in a few, as was pointed out in the last section.

It has been repeatedly decided that these exemptions are a personal privilege, and persons are not disqualified to serve on juries, if exempted by law; and it is no ground for reversing a verdict when a coroner served on a jury who was exempt by law,³ nor if a minister serve.⁴

A judge of a town court in Maine is not by reason of holding that office rendered incompetent to serve as a juror in the supreme judicial court;⁵ and officers of the United States, though exempt, are not disqualified to act as jurors.⁶ A member of the legislature is entitled to be excused from serving on a jury while the legislature is in session.

The court will excuse one from the jury, if he holds a public trust that cannot be deputed. Otherwise if the trust is private, or if it can be deputed.⁷

§ 120. *Right to exempt.* — An important question sometimes arises as to the right of the legislature to exempt certain classes, and how far the power of exemption can be exercised. That the power can be exercised is unquestioned;⁸ but evidently it could not be exercised to such an extent as to impair the right of obtaining an impartial and efficient jury. Thus Bacon says: "It seems agreed that the king by grant or his charter, may exempt one, two, or more from serving on juries. But he cannot exempt a whole county or hundred, because in such case there would be a failure of justice. . . . Also, by

¹ Cal. Code Proc. § 200.

² Rev. Stat. Mass. c. 218, § 8; 2 Rev. Stat. N. Y. 415, § 33. Those who have served within three years on a jury in Massachusetts are exempt. *Ex parte Brown*, 8 Pick. 504. In other States, a yearly service is generally required.

³ *State v. Wright*, 53 Maine, 328; *State v. Forshner*, 43 N. H. 89.

⁴ *State v. Adams*, 20 Iowa, 486.

⁵ *Page v. Lewis*, 26 Maine, 360.

⁶ *State v. Quimby*, 51 Maine, 395. Any person may be excused in New York who is in the actual employment of any glass, cotton, linen, woollen, or iron manufacturing company by the year, month, or season. *People v. Holdridge*, 4 Lans. 511.

⁷ *Piper's case*, 2 Browne (Pa.), 59.

⁸ *Colt v. Eves*, 12 Conn. 243.

the better opinion, the sheriff cannot return such privilege of exemption, but each particular juror must come in and demand it."¹

In a case in Nevada, the legislature passed an act allowing "the judges of the several districts by an order entered upon the minutes of their courts to prescribe bounds in their several counties, and all persons residing without such bounds may be exempted from serving on juries in the manner hereinafter prescribed," which was by making proof of residence and paying twenty-five dollars. The question arose whether this was a legitimate exercise of legislative power. The court, while holding the exercise of such a power to be pernicious, as tending to impose a duty upon men unable to pay for the exemption, and to encourage a class of professional jurymen, decided, nevertheless, that the act was constitutional.²

This decision certainly carried the legislative power to an extreme limit, — to a dangerous limit it is feared; for it goes beyond the power claimed for the king in England, and which Bacon says cannot be exercised. It is hoped that it will not be taken as a precedent in other cases. An act exempting a fire company from jury duty, so long as they were members, is constitutional;³ and so of postmasters.⁴

§ 121. Selection: How made. — Having now treated of the various qualifications required in jurors, and the persons exempt from serving, we are next to inquire as to the manner and time when the selection is made. Generally the selection is made periodically, either every three years, as in Massachusetts and New York;⁵ biennially, as in Alabama,⁶ or more generally yearly.

The duty of making this selection is intrusted either to cer-

¹ Bacon's Abr. Juries (E).

² *State v. Cohn*, 9 Nev. 179. This decision is very questionable under the principles Cooley lays down, thus: "A statute would not be constitutional which should proscribe a class or party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt." Const. Lim. 390.

³ *Bloom v. State*, 20 Geo. 443.

⁴ *State v. Williams*, 1 Dev. & Bat. 372.

⁵ Mass. Gen. Stat. c. 132, § 3; 2 N. Y. Rev. Stat. 412.

⁶ Rev. Code (1867), § 4062.

tain officers, who constitute a board for that purpose, or to a court; the former is the mode more generally adopted. We cannot examine in detail the statutory enactments of each State as to the manner in which this selection is made; we shall endeavor to give a general classification, which will be found, it is hoped, convenient and practical.

Throughout the New England States the selection is made in towns, by their officers, and at a meeting of the town the lists are revised and corrected. Thus, in New Hampshire the selectmen annually make a list of those they deem qualified.¹ In Vermont each town board, at its annual meeting, agree upon a number to serve as jurors for the ensuing year;² and in Rhode Island the town council every year make out a list.³ In Maine the municipal officers, treasurer, and clerk of each town prepare the lists once in every three years, and the town at a meeting can strike off, but cannot insert names.⁴

In Massachusetts the selectmen prepare the lists yearly, and submit them to the town, and at a meeting of the town the lists may be revised either by adding or striking off names.⁵ According to this provision, a list of persons to serve as jurors was prepared and laid before a town by its selectmen. The town voted that said list be not accepted, and also voted to elect a list by nomination. Thereupon several persons, part of whom were on the list prepared by the selectmen, and part not on the list, were nominated and declared chosen. It was held that these persons were legally selected as jurors.⁶ The list is made up in townships in Michigan.⁷

§ 122. The list is made up by supervisors in a few States; as in New York, where once in three years the supervisor and assessors of the several towns of the State are required to assemble at the place appointed by the supervisors for the purpose of making a list of persons to serve as jurors for

¹ Gen. Stat. c. 194, § 1.

² Gen. Stat. tit. 9, c. 15, § 89.

³ Gen. Stat. (1872) p. 432.

⁴ Rev. Stat. (1871) c. 106, §§ 1, 2.

⁵ Gen. Stat. (1866) c. 132, §§ 6, 7.

⁶ *Page v. Inhabitants of Danvers*, 7 Met. 326.

⁷ Comp. Laws (1871), § 5977.

the then ensuing three years.¹ In California the board of supervisors of each county must at their first regular meeting in each year, or at any other meeting if neglected at the first, make a list of persons to serve as jurors in courts of record for the ensuing year.²

In Wisconsin the board of county supervisors at their annual meeting in November make out lists.³ In West Virginia the board of supervisors at their meeting in January prepare lists.⁴

§ 123. A list is drawn up by a court or judge in other States. In Delaware the levy court of each county, at its annual session in March, selects from the list of taxable citizens the names of one hundred "sober and judicious persons" to serve as grand jurors, and the names of one hundred and fifty other "sober and judicious persons" as petit jurors.⁵ In Virginia the judge of the county or corporation court annually, at the May or June term, prepares a list of one hundred at least, and not more than three hundred for each county.⁶

The selection is made by the county court in Tennessee, Texas, and Oregon.⁷

In North Carolina courts of pleas and quarter sessions make up lists yearly.⁸

Lists are made out in Nevada by the district judge and county clerk. The list shall be kept in the office of the county clerk, and shall be at all proper times subject to the inspection of any citizen of the county.⁹ In Maryland, under Act 1868, c. 816, any one of the circuit judges may select the list of names from which the jurors are to be drawn.¹⁰

¹ 2 Rev. Stat. 411. There is a special law relating to the city of New York. See Laws 1870, c. 539, and for the County of Kings. *Kenney v. People*, 31 N. Y. 330.

² Code Proced. § 204.

³ Taylor's Stats. (1871) vol. 2, p. 1327.

⁴ Code (1868), c. 116, § 3.

⁵ Rev. Stat. c. 109, § 2.

⁶ Chap. 57, Laws 1871.

⁷ Rev. Stat. Tenn. § 3981; Paschall's) Dig. § 3975; Gen. Laws Oregon (1874) § 921.

⁸ Rev. Code (1855), p. 161.

⁹ Comp. Laws, § 1052.

¹⁰ *Friend v. Hamill*, 34 Md. 294.

§ 124. The list is made out by commissioners specially appointed in most of the remaining States, as in Arkansas, Florida, Illinois, Kansas, Kentucky, Minnesota, Nebraska, and Pennsylvania.¹

In the last State the selection is made by the sheriff and county commissioners, who are required to put the names on separate slips of paper into a "wheel," and lock it and seal with their seals; the key to be kept by the sheriff, the "wheel" by the commissioners. It was held that when jurors were drawn from a "wheel" which had but one seal, the array should be set aside.²

In Alabama the sheriff, judge of probate, and clerk of the circuit and city court must meet biennially on the first Monday in May or thirty days thereafter, and select a list of jurors.³

In Georgia the ordinary of each county, clerk of the Superior Court, and three commissioners for each county, on the first Monday of June biennially prepare the list.⁴ In Indiana the treasurer, auditor, and recorder meet on the sixth Monday before the commencement of the term, and make a list on separate slips of paper of the names of one hundred reputable male householders, which they deposit in a box.⁵

§ 125. Failures to comply with statutory regulations, will not render the selection void, or be sufficient to quash an array, when the selection was not made at the time appointed. It is held that these directions are not mandatory; and if through some default or omission a selection is not made at the regular time, it may be made afterwards. Thus, where a city charter required that a certain number of jurors should be

¹ Ark. Dig. (Gantt) § 3663; Bush's Dig. (Fl.) p. 439; Rev. Stat. (Ill. 1874) c. 78, § 1; Gen. Stat. (Kan. 1868) p. 534; Gen. Stat. (Ky. 1873), p. 571; Bissell's Stat. (Minn.) p. 221; Gen. Stat. (Neb. 1873) p. 642; Purdon's Dig. (Pa.) p. 579.

² *Brown v. Commonwealth*, 73 Penn. St. 321.

³ Rev. Code (1867), § 4063.

⁴ Code (1873), § 3907.

⁵ 2 Rev. Stat. (G. & H.) p. 30. In England, by statute 6 Geo. IV. c. 50, the sheriff is directed to return the names, abodes, and descriptions of a number of jurors, not less than forty-eight, nor exceeding seventy-two, taken from the Jurors' Book, which is annually made up for each county from lists returned from each parish therein of persons qualified to serve as jurors.

chosen on the first Monday of July, and they were not chosen until the 8th of August, it was held that this provision was directory, and that a jury impanelled from the jurors so chosen was a legal jury.¹ And a statute requiring the board of supervisors of a certain town and the common council to select and return before the last day of May, the names of persons qualified as jurors, in the municipal court, is merely directory, and if they are properly selected and returned afterward, it is no ground of challenge.² And where a statute directed jury lists to be made from tax returns once in every three years, it is directory to public officers in the discharge of their duty, and if they fail to discharge it, and the jury is taken from the old list, it does not vitiate the array, nor is it a cause of challenge.³

§ 126. Lists are required to be filed, and deposited, in a box on separate slips. The filing of the list is generally in the county clerk's office, for the purpose of public inspection and examination. In some States, after the list is made up, it is sealed, and the clerk to whom it is given is sworn not to open it until the time prescribed by law.⁴

In Indiana, if the names of the petit jurors have not been recorded by the clerk, conformably to the statute, it is a good cause of challenge to the array.⁵

But where a statute directed that the list drawn up by the board of county commissioners should be "forthwith delivered to the clerk of the District Court," a failure to comply until some days after is not such a "material departure from the forms prescribed by law in respect to the drawing and return of the jury," as is a ground for challenge.⁶

The names, when deposited in a box, are to be written on separate slips of paper, and folded so that the names do not appear. Thus, it has been allowed as a ground of challenge to the array, when the clerk left the ballots unrolled in an open

¹ *Colt v. Eves*, 12 Conn. 243.

² *Burlingame v. Burlingame*, 18 Wis. 285.

³ *State v. Massey*, 2 Hill (S. C.), 379. See *Perry v. State*, 9 Wis. 19; *Sumrall v. State*, 29 Miss. 202.

⁴ This is the case in Arkansas. *Gantt's Digest*, § 3675. In Kentucky, Gen. Stat. (1873) p. 571.

⁵ *Mitchell v. Likens*, 3 Blackf. 258; *Mitchell v. Denbo*, Ibid. 259.

⁶ *State v. Gut*, 13 Minn. 31.

box.¹ In making out the list of names, it is required by some statutes that the names shall be given, with description and places of residence. The original reason for this is stated to be, that the sheriff might know accurately on whom to levy the "issues" or fines for non-attendance.² It is held, however, that this requirement is merely directory; and it is a sufficient mark of identity or description, when the addition is given by a title by which the person is commonly known in the community. Therefore the addition "mill boss" was held insufficient to quash the array for want of a suitable addition to the name of one of the jurors.³

§ 127. **Drawing the Panel.** — There is a remarkable uniformity in the American States in regard to the method of obtaining jurors from the general body or list for the trial of any particular cause. It was found that the power and discretion given to the sheriff in England could not be safely intrusted to an officer here, and, therefore, in almost all our States,⁴ the panel of jurors which the sheriff is required to summon is first ascertained by lot by a drawing by a designated officer in the presence of certain others who are appointed to attend by statute.

The drawing is directed to take place a certain number of days previous to the commencement of the term at which the jurors are required to attend; the list so obtained is required to be given to the sheriff, who is ordered to summon the persons whose names are thus given, a stated number of days before the opening of the court. Great precaution is taken to have the drawing properly evidenced and attested by certain

¹ *Pringle v. Huse*, 1 Cow. 432. A failure to have the name of each juror written on a separate slip of paper and drawn as required, is fatal to the array. *Brazier v. State*, 44 Ala. 387.

² 27 Eliz. c. 6.

³ *Clark v. Commonwealth*, 29 Penn. St. 129.

⁴ In Missouri the sheriff is still permitted to summon jurors and select them, somewhat as in England. Thus, when a jury is required for the trial of any cause, the sheriff is ordered to return eighteen qualified jurors. See *Wagner's Stat.* (1870) vol. 1, p. 800. In Tennessee the practice is for the County Court to designate twenty-five good and lawful men to serve as jurymen at the next Circuit Court, and if necessary thirty-seven may be designated. The list made out is given to the sheriff, who summons at least five days before the sitting of the court. *Stat.* 1871, §§ 3981, 3991.

officers whose presence is required. This is a general outline of the method adopted. As an example, let us turn to the statute of Alabama. Twenty days before the term, the judge of probate, sheriff, and clerk of circuit or city court, or a majority of them, draw the number necessary from the jury box, allowing thirty persons for each week of the term. When a special term of the court is to be held for unfinished business, thirty are to be drawn for each week; for a trial of a felony, if capital, fifty are to be drawn, if not capital, twenty-four, ten days before the term.¹

In New York the drawing is directed to be conducted as follows: Fourteen days before the holding of any circuit court, or sittings, or of any special court of oyer and terminer, when no circuit is appointed to be held at the same time, or any court of common pleas or mayor's court, the clerk of the county in which such court is to be held shall draw the names of thirty-six persons to serve as jurors to such courts, and any number in addition thereto that shall have been ordered according to law. Six days' notice of the drawing is to be given; and a copy of the notice served on the sheriff, and upon the first or some other judge of the county courts, at least three days before the drawing. These officers attend and witness the drawing, the mode of which is minutely pointed out in the statute. When the drawing is finished, a minute of it is signed by the clerk and the attending officers, and filed in the clerk's office.²

§ 128. The drawing in certain other States, except in a few particulars as to the time and the officers to be present, is the same as the method just described in New York. In Florida it is similar, except that the time when the drawing is to take place is thirty days before the opening of the term.³ In Illinois the clerk of the court, twenty days before the commencement of the term, is to proceed to the county clerk's office, and in his presence shall draw not less than thirty for each two weeks of the session.⁴

In Louisiana, thirty days before the opening of the court,

¹ Revised Code (1867), § 4067.

² 2 Rev. Stat. 413, 414.

³ Bush's Dig. (1872) p. 439.

⁴ Rev. Stat. (1874) c. 78, § 8.

the sheriff, parish judge, and clerk of the District Court, with two qualified electors, draw up lists, and put names on separate slips into a box, from which one of these officers in the presence of the others draws not less than forty-eight, or a larger number if directed by the district judge, and the list of names so drawn is filed in the clerk's office.¹ In Michigan the county clerk, in the presence of the sheriff and two justices of the peace, draws twenty-four, fourteen days before opening of the court.²

In California the drawing takes place in the presence of the sheriff and county judge, by the clerk, after a receipt by him of an order by a judge of a court where a jury is required. If these officers do not attend, two electors of the county are to be notified; and if at an adjourned day any two of these parties appear, the drawing takes place; and the same method is pursued as in New York.³ In Pennsylvania a *venire* is first issued and directed to the sheriff and commissioners, requiring them to draw and summon a certain number for service at a term of the court. These officers, the sheriff and at least two of the commissioners, shall without delay, after receiving the *venire*, draw from the proper wheel, after having turned the same sufficiently to intermix the papers deposited therein, the names of so many persons to be jurors as shall be required by such writ.⁴

§ 129. The officer drawing the panel is usually the clerk of the court, and he is required to be impartial as between the respective parties; and any error or default in this respect will be a ground of challenge to the array.⁵ When the clerk is required to draw, it is error to permit the drawing by any other person. So where the Circuit Court caused the panel of petit jurors for a term to be filled by the sheriff, instead of the clerk drawing from the list selected by the county board, it was held a good ground of challenge even in a civil cause.⁶ But it is decided that a deputy clerk can draw, in the absence

¹ Rev. Stat. (1870) § 2127.

² Comp. Laws (1871), § 5985.

³ Code of Proc. §§ 214-219.

⁴ Purdon's Dig. p. 58.

⁵ Gardner v. Turner, 9 Johns. 260.

⁶ Gropp v. People, 67 Ill. 154.

of the clerk.¹ A record having stated that the drawing of jurors was made "by the clerk, sheriff, and justice of the peace," the statute requiring that it be made "by the clerk in the presence of" these officers, and this being made a ground of challenge, it was held proper to admit the testimony of the clerk to contradict the record, and show that the drawing was regular.² It is not a good ground of challenge, that the circuit clerk is attorney of one of the parties, and was so at the time of drawing, making, and arranging the panel;³ and the fact that a clerk of a court was formerly a counsel in the case for the plaintiff in error, he making no objections at the time of striking the jury, and such a relation having ceased, is not a disqualification to make up a struck jury in the case of which the plaintiff in error can take advantage.⁴ When the statute is silent as to the manner in which the clerk shall draw, it is sufficient if the drawing is fortuitous.⁵

§ 130. Mistakes and omissions in drawing will not always make it void, or be a cause of challenge, as it is held that the statutory regulations are merely directory; so that a failure to comply with them will not vitiate a verdict.⁶ A very strict rule in relation to this was held in a case in Louisiana. It was there decided that when the petit jury have not been drawn in the mode prescribed by law, the trial, conviction, and sentence are null, and the prisoner stands as though he had not been tried.⁷ This would, as a general rule, only be held good where the objection was made before the trial, and will not be sufficient if raised afterwards on appeal.⁸

¹ *People v. Fuller*, 2 Park. Cr. 16. In Iowa the statute makes provision for this. Code (1873), § 241.

² *State v. Gut*, 13 Minn. 341.

³ *Wakeman v. Sprague*, 7 Cow. 720.

⁴ *Beatty v. Hatcher*, 13 Ohio N. S. 115.

⁵ *Beneway v. Conyne*, 3 Chand. (Wis.) 214. It is sufficient if they are drawn from a hat. *Birchard v. Booth*, 4 Wis. 67.

⁶ *Cole v. Perry*, 6 Cow. 584; *State v. Gillick*, 7 Clarke (Iowa), 287.

⁷ *State v. Da Rocha*, 20 La. An. 356.

⁸ *Burton v. Ehrlich*, 15 Penn. St. 236; *Stone v. People*, 2 Scam. 326; *State v. Cole*, 9 Humph. 626; *Dayharsh v. Enos*, 1 Seld. 531; *Brown v. State*, 7 Eng. (Ark.) 623; *Wilcox v. School District*, 6 Foster (N. H.), 303; *Thrall v. Smiley*, 9 Cal. 529; *State v. Marshall*, 36 Mo. 400; *Haight v. Holley*, 3 Wend. 258; *State v. Ward*, 2 Hawks, 443.

The Mississippi Code provides that the laws in relation to the mode of selecting, drawing, summoning, and impanelling all juries are merely directory, and such juries, after being impanelled and sworn, shall be considered valid juries;¹ and it is further provided, that no challenge to the array shall be sustained except for fraud, nor shall any *venire facias* (except a special *venire facias* in a criminal case) be quashed for any cause whatever.²

Any objection to the panel should be taken advantage of by motion to set it aside; that there were a greater number than prescribed by law, is in favor of the defendant, and he cannot object, though the State might;³ but the summoning of fifteen when a panel of twenty-four is required by law, is a good ground for challenge, and the error is not waived by going to trial.⁴

It is no cause of challenge to the array that two sets of jurors are drawn at the same time from the jury box for two distinct courts, if they are kept separate, and a distinct panel of each is given to the sheriff, nor if they are not drawn at the time pointed out before the opening of the court;⁵ but it is a sufficient cause of challenge to the array when the clerk drew seventy-two names out of the box and put them in a list, and then designated thirty-six names so drawn to be a panel for one court, and the others a panel for a different court.⁶

If a juror is wrongly named on the panel, he cannot be sworn;⁷ and in New Jersey it has been held if one of the juror's names is omitted in the copy of the panel delivered to the prisoner, the juror cannot be sworn.⁸ When on the name of a person being called, he answered to it, but said there was a mistake in his middle name, it was allowed to be corrected and he was accepted.⁹

¹ Rev. Code (1871), § 2843.

² Code, § 743; *Baker v. State*, 23 Miss. 243. In *Indiana*, 2 Rev. Stat. (G. & H.) 31, no challenge to the array shall be permitted because of any informality in the impanelling or selecting such jury.

³ *Anderson v. State*, 5 Ark. 445.

⁴ *Baker & Griffin v. Steamboat*, 14 Iowa, 214.

⁵ *Crane v. Dygert*, 4 Wend. 675.

⁶ *Gardner v. Turner*, 9 Johns. 260.

⁷ *United States v. Wilson*, 1 Bald. 78.

⁸ *State v. Powell*, 2 Halst. 244.

⁹ *Judge v. State*, 8 Geo. 173. A juror was selected and summoned to attend as

Where a statute requires the drawing to be in the presence of the court, and when a jury was drawn not in the presence of the court, it was held to be illegal;¹ but a jury drawn while the court was in session, in the presence of the court and its officers, must be held to have been drawn in open court, whether it was done in the room where the court usually sits, or in any other room of the court-house.²

§ 131. *Summoning the Jury: English Mode.*—Formerly in England the jurors were summoned to the court at Westminster by means of a *venire facias*; but when the Court of Common Pleas was severed from the Curia Regis, which occurred in the reign of John, it was found to be very inconvenient to take juries from all parts of the country. But by the statute of Westminster the second, c. 30, they were to be taken before the justices of assize in pleas, which required only an easy examination when the justices made their periodical visit. Hence, a writ of *nisi prius* was first sued out for the jurors.³ The hardship then was, that as the sheriff was not obliged to return the writ until the day when the justices opened the court, there was no means of knowing the names of the jurors, so that an examination could be made by the parties. This led to the statute 42 Edw. III. c. 11, which provided that no causes should be tried at *nisi prius* until the sheriff had re-

a juror under the name of E. Barry, but his true name was E. Berry or Edward Berry; it was held that the variance was immaterial, when it satisfactorily appeared that the person attending was the one really selected. *State v. McNamara*, 3 Nev. 70. Where, on the trial of a capital case, the scrolls had not the christian name written in full, but only the initials, no objection being made when the scrolls were put in the hat, this formed no ground of challenge. *State v. Simmons*, 6 Jones Law (N. C.), 309. When the jury lists had been destroyed by fire, it was competent for the district court to cause a precept to be issued to the sheriff, directing him to summon a new panel from the body of the county. *State v. Arthur*, 39 Iowa, 631.

¹ *Convers v. Grand Rapids, &c.* R. R. Co. 18 Mich. 459.

² *State v. Millain*, 3 Nev. 409. In Pennsylvania it has been decided that if the jury are not drawn by the sheriff and county commissioners so that the prisoners can be tried at the first court, they will be entitled to a discharge, unless tried at the next session. *Commonwealth v. Prophet*, 1 Browne, 135. When the panels have been drawn from a box of only one thousand persons, whereas the number subject to jury duty from whom he had a right to select was four thousand, it is not a good ground of challenge when no proof was offered. *Malone v. State*, 49 Geo. 210.

³ 2 Hawk. P. C. 567.

turned the names of the jurors to the court.¹ Then the *venire* was changed; the part relating to *nisi prius* was taken out; and the sheriff, instead of bringing the jurors, as the writ literally required, merely returned their names into court; and a second writ was afterwards issued, on the supposition that the first writ was disobeyed, called a *venire facias distringas* issued with reference to the individual cause. With reference to such procedure, it is remarked: "Whether it is advisable to encumber the process by a fiction may well admit of a doubt. It has too long been the disgrace of the English law that it pertinaciously adheres to forms which are inconsistent with truth. Nor can any reason be assigned for doing so, except the unsatisfactory one that the falsehood deceives nobody. But surely it is better to make the form correspond with the reality, and not accustom ourselves to the use of language which is either unmeaning or untrue, and in some cases both."²

§ 132. **The Venire.** — In the summoning of the jury; as in many other instances, we have simplified our processes, and rid them of whatever was cumbersome and merely formal. We still use the writ of *venire* to summon a panel, but we do not attach to it the unmeaning and unnecessary forms of which a writer complained in the last section. In many, if not all, our States, a jury can be summoned by a simple order or precept of the judge, either given verbally, or entered upon the minutes.³

¹ The use which, as might be expected, parties made of this knowledge, is evident from passages in the Plumptre Correspondence in the reign of Henry VII. At page 131, the writer, John Pullan, who dates his letter from "Lincoln's Inne at London," says with reference to a trial which was about to take place: "The copie of the retorne and pannell I send to you enclosed herein for more suretie, as tother letter is delivered. Sir, to speak of the labour I made to the contrary, I have written the circumstance thereof in my master letter, and surelye it was to the uttermost of all my power. It is so now I understand, they will have a *habeas corpora* againe the jurors retornable Octabis Trinitatis, so that they may have a distress with a *nisi prius* againe Lammas Assize. Therefore, Sir, between you and my lady, ye must cause speciall labour to be made, so it be done privily, to such of the jurors as ye trust will be made friendly in the cause." It seems afterwards in this case a new *venire* was directed to the coroners, and the same writer says: "I would your mastership made speciall labour to have one indifferent pannell of the coroners; they must be laboured by some friend of yours."

² Forsyth, Trial by Jury, p. 170.

³ United States v. Reed, 2 Blatchf. 435; Bennett v. Tennessee, Mart. & Yerg. 133; Samuels v. State, 3 Mo. 68.

It is admitted, however, that whenever a *venire* is issued, it should have the seal of the court, and one without a seal is void.¹ In our statutes there are directions given as to the time when a sheriff is to summon the jury. It is a mere ministerial act, after he receives the list as returned to him after the drawing by the county clerk; and it has been held he may summon, even without such an order, under the statute, and need not wait for the issue of the *venire*; ² but he cannot summon until the panel is first drawn by the clerk.³ By statute in New York, it is not necessary in any case to issue or award any *venire* for the summoning of jurors to attend any circuit court or sittings, court of common pleas, or mayor's court, except when a foreign jury shall be ordered.⁴

Whenever a *venire* is issued or required, there are, however, certain requirements that must be observed, or the array may be quashed. After a plea of the general issue, no objection to the *venire facias* can be made, and therefore the want of one is not error.⁵

The qualifications of jurors required by statute ought to be stated in the *venire*, but where a *venire facias* directed the sheriff to summon "good and lawful men" to serve as jurors, it is sufficient, without showing the particular qualifications necessary to constitute them "good and lawful" jurors.⁶ A court of special sessions can issue a second *venire* for a jury to try the defendant, if the first jury are discharged because they cannot agree.⁷

§ 133. **Mistakes and Omissions in Venire.** — It is no objection to a *venire*, that the day on which it issued is not in-

¹ *People v. McKay*, 18 Johns. 212. Though a seal is necessary, it is not essential that the impression of the device should be manifest on the seal. *State v. McMurray*, 3 Strobb. 33.

² *Samuels v. State*, 3 mo. 68.

³ *State v. Williams*, 5 Port. 130.

⁴ 2 Rev. Stat. 410.

⁵ *State v. William*, 3 Stew. 454; *Johnson v. Cole*, 1 Pennington, 266; *Peri v. People*, 65 Ill. 17.

⁶ *Barton v. Murray*, 1 Pennington, 97; *Cox v. Haines*, 2 Ibid. 687; *State v. Alderson*, 10 Yerg. 523.

⁷ *Vandeverker v. People*, 5 Wend. 530. A *venire* issued in Mississippi may be made returnable on the same day it is issued, or any day during term. *Shaffer v. State*, 1 How. 238.

dorsed upon it, if it appear that it was issued within the proper time;¹ but a *venire* issued twenty days before the term of the court is not therefore invalid because it was prematurely issued; the law is merely directory.² A command to a sheriff in a special *venire* to summon a jury "residing as near as may be to the place where the murder was committed," was held to be a material error, and a ground for the reversal of a judgment.³ It is usual for the names of the jurors to be inserted in the *venire*; but if they are appended to it in a list, it is held to be sufficient.⁴

A *venire* ran in these words: "I command you to summon," &c., &c., and was signed by the clerk of the court in his own name, without the addition of his office, and it was held valid.⁵ It is valid although the sheriff has not indorsed on it the fact of entry in his office.⁶

Whether a *venire* be issued or not, the files and records must always show how the jury came to be called, and there is no presumption for or against their having been summoned at the instance of the court.⁷

Any irregularity in the issuance or direction of the *venire* to summon the petit jury must be excepted to before the jurors are sworn, and not after verdict.⁸

This is now the general rule, and it will be found a judicious and salutary one, and will have a tendency to obviate those frequent complaints we hear of the failure of justice through some technical omission in legal proceedings. Lately, courts are not disposed to entertain such pleas, except where there has been a manifest omission to the prejudice of the accused; but the rule is becoming well settled, that no error can be assigned after a verdict, when the parties failed to have it noticed before the jury were impanelled and sworn.

§ 134. *Venire* — to whom directed. — The officer to whom

¹ *State v. Stedman*, 7 Port. 495.

² *Wash v. Commonwealth*, 16 Gratt. 530.

³ *Shaffer v. State*, 4 How. (Miss.) 238.

⁴ *State v. McElmurray*, 3 Strobb. 33.

⁵ *State v. Cole*, 9 Humph. 626.

⁶ *State v. Clayton*, 11 Rich. Law (S. C.), 581.

⁷ *People v. Treadway*, 17 Mich. 480.

⁸ *Brown v. State*, 12 Ark. 623; *Freel v. State*, 21 Ark. 213; *Bennett v. Matthews*, 40 How. Pr. 428.

is intrusted the duty of summoning the panel, is generally the sheriff. In the New England States a constable is appointed for this purpose. In New Hampshire the town clerk, constable, or one of the selectmen serve the *venire*.¹ In Connecticut a *warrant* is issued to a constable to summon eighteen, whose names are given him.²

In case of any possible or suspected bias in the sheriff, the duty is then put upon the coroner, and in case of any objection to him, it is intrusted to certain persons called *elisors*.³ If the sheriff have any connection or relationship with either of the parties, it will be a ground of challenge to the array;⁴ or if he has any interest in the cause, for the trial of which the jury is summoned, it is sufficient to disqualify him.⁵

The sheriff is the proper officer, and to him must be intrusted this duty so long as no imputation of unfairness or bias is alleged against him; and any interference by a party is illegal and vitiates the return.⁶ And in case of the inability of the sheriff to act by reason of sickness, the court has no power to direct a coroner to impanel a jury in a criminal case.⁷ Hence, jurors may be summoned by a deputy sheriff.⁸

In Indiana the Circuit Court may appoint an *elisor* for the purpose of summoning a jury in a cause in which the sheriff is a party, there being no coroner in attendance; and a person, though he has served under the sheriff, as bailiff to the petit jury in other cases, may be appointed such *elisor*.⁹ Where a party objecting to a sheriff on account of prejudice, asks the court to appoint an *elisor*, his objection is sufficiently manifest to the coroner also, and an *elisor* may be appointed.¹⁰ But where

¹ Gen. Stat. c. 194, § 14.

² Gen. Stat. (1866) tit. 1, c. 9, § 131. In the city of New York, and in Brooklyn, jurors are summoned under special laws by "a commissioner." *Laws of New York* (1870), c. 593; *Kinny v. People*, 31 N. Y. 530.

³ Bacon's Abridg. Juries (B).

⁴ *Mushower v. Patton*, 10 S. & R. 334; *Walker v. Green*, 3 Greenl. 215; *People v. Welch*, 49 Cal. 174.

⁵ *Cowjill v. Wooden*, 2 Blackf. 332; *Woods v. Rowan*, 5 Johns. 133; *Watkins v. Weaver*, 10 Johns. 107.

⁶ *State v. Johnson, Cox* (N. J.), 219.

⁷ *State v. Monk*, 3 Ala. 415.

⁸ *Kelly v. State*, 3 Sm. & M. 518; *Conner v. State*, 25 Geo. 515.

⁹ *State v. Bodly*, 7 Blackf. 355.

¹⁰ *Harriman v. State*, 2 Greene (Iowa), 270.

a sheriff is disqualified to act, the bailiff may summon the jury, if the court so order.¹

In a case in California, where the sheriff was sued for trespass, it was decided to be no error, but a very proper proceeding, to order a special jury to try the cause, instead of the regular panel, and there being no coroner, an elisor was properly appointed to summon the jury.²

It has been decided in Michigan, that a conviction by jurors, properly drawn and impanelled, will not be disturbed because the jurors were not summoned by the proper officer.³ This certainly is carrying the immunity to a great extent; but, on the whole, it cannot work any injustice where the prescribed course of selection and drawing has been faithfully pursued. The language of the court in that case, used by Cooley, J., a good authority, is: "There is no claim that the jurors were improperly drawn, or that there was any improper conduct by the sheriff. The only complaint is that the wrong officer summoned them. We think there is nothing in this objection. If the jurors, after being properly drawn, had appeared without being summoned at all, no objection could have been taken afterwards; and at the most the action of the sheriff can only be treated as a nullity. It is immaterial to this case, therefore, which officer was entitled, under the statute, to serve the *venire*." It is possible, however, for this decision to be misapprehended. It could not hold good where any discretion or judgment is to be exercised by the sheriff;⁴ it should only be applied where the officer performs purely ministerial duties, where there cannot be any error or injustice by his acts.

§ 135. The proper officer must summon, in other States, and the decision in Michigan would hardly be approved or followed. Thus, in Ohio it is provided by statute, "that

¹ Phillips v. State, 29 Geo. 105.

² Pacheco v. Hunsacker, 14 Cal. 120.

³ People v. Williams, 24 Mich. 156.

⁴ Thus, in New Jersey when a *venire* was directed to any one of the coroners, &c., without any suggestion that the sheriff was exceptionable, it was held a fatal defect and not cured by a verdict. Hugg v. Kille, 2 Halst. 435. But under the practice there, the sheriff, as in England, has the power to select from the body of the county a panel of jurors.

when a grand or petit jury shall be selected, drawn, and summoned contrary to the provisions of this act; or where the sheriff or other officer shall not have proceeded, in executing the writ of *venire facias* to him directed as herein before described; then, and in either of those cases, the whole array of the jury may be challenged and set aside, and a new *venire facias* be awarded returnable forthwith."¹ And it was there held that if a jury be illegally impanelled, because no *venire* issued for them, the defendant should make the objection when the jury is impanelled; but cannot make it a ground for a new trial.²

However, the rule may be fairly stated to be, that when a drawing has taken place, so that the selection of the jury is fortuitous, technical pleas as to the manner of summoning them, as to any default or omission, will not be heeded, unless in trials for the higher grades of crime, involving a person's life, or imprisonment for a long period, when every objection is made available to the accused. The decisions, and the statutes, show a tendency to remove the reproach too long attached to legal proceedings, that mere technical objections had too frequently obstructed the course of justice.³

§ 136. *Return of the Venire.* — The officer to whom the *venire* is directed is required to make a return, either before or on the day the court opens. This is now regulated by statute. In Alabama, New York, California, and Pennsylvania,⁴ for instance, the return is made at the opening of the court; and this is the general rule. For instance, the *venire* in Pennsylvania runs thus: "and that you the said sheriff have then and there this writ, and the names of the persons so summoned with their additions respectively in a panel hereto annexed, and otherwise make return at the day and place aforesaid, how you shall have executed this writ." In Nevada the sheriff is required to make a return two days before the open-

¹ 1 Rev. Stat. 755.

² Hurly v. State, 6 Ohio, 399. See People v. Devine, 46 Cal. 46.

³ Forsythe v. State, 6 Ohio, 19; Thomas v. State, 5 How. (Miss.) 20; Sutton v. State, 9 Ohio, 133; Parks v. State, 4 Ohio N. S. 234; Ferris v. People, 35 N. Y. 155; Gardiner v. People, 6 Park. Cr. 155.

⁴ Rev. Code (Ala. 1867), § 4073; 2 N. Y. Rev. Stat. 414; Cal. Code Proced § 225; Purdon's Dig. p. 581.

ing of the court.¹ A fine is imposed by statute on the officer failing to make a return to the *venire*. The return is required to state the names and number summoned, and the manner of summoning. Where a *venire facias* directed the constable to cause a juror to be drawn, not more than twenty nor less than six days before the opening of court, and he made return that the juror was drawn "as above directed," but without date, the return was held sufficient; and it was good when he signed himself "constable of the town," without saying of what town.²

The neglect of the sheriff to sign his return to the jury process directed to him does not render it incurably vicious, and is not a sufficient reason to quash the array of jurors; but the court will quash the return to the process, and on motion will direct the sheriff to complete his return by indorsing on his writ the execution thereof, and signing the same.³ Where a sheriff makes a return to the writ that the jury were drawn and summoned according to law, it will be presumed that he has proceeded legally until the contrary is shown.⁴ It is not necessary that the *venire facias* should be spread upon the minutes of the court; the record should show the return of the *venire*, and the selection of a proper jury.⁵

Where the return of a constable on a jury warrant stated that "Whereas he proceeded to the town clerk's office and drew out of the jury box the name of L. in the presence of D., clerk of the town, and read the summons in his hearing," it was held sufficient, as the obvious import was, that the constable read the summons in the hearing of the juror.⁶ It was held not a good ground of challenge when the sheriff did not make the return at the time prescribed, because the law was directory and not mandatory.⁷ A return of a sheriff to a *venire* that he did, "at least six days before the sitting of the court, serve the summons upon the within named parties to serve as petit jurors, by reading," &c., is not a sufficiently

¹ Compiled Laws (1873), § 1054.

² *Fellows' case*, 5 Greenl. 333.

³ *Commonwealth v. Chauncey*, 2 Ashmead, 90.

⁴ *Commonwealth v. Green*, 1 Ibid. 289.

⁵ *Conner v. State*, 4 Yerg. 137.

⁶ *Maples v. Park*, 17 Conn. 333.

⁷ *Mowry v. Sts buck*, 4 Cal. 274.

material variance from the statutory direction that he served it on "twenty jurors named therein," and is not a ground of challenge.

It may happen that a juror may have been summoned, and yet his name may be omitted in the return made to the court by the officer. In such a case, it has been permitted to impanel the juror, on his making oath that he had been summoned;¹ and so where it did not appear by the constable's return at what time he summoned the jurors, they were put upon the panel upon making oath that they had received due notice.²

§ 137. Number returned. — At common law, the writ required the sheriff to return a panel of twelve, but by an established practice, he generally returned twenty-four; the reason of which is given by Coke, that if twelve only should be returned, no man could have a full jury appear or be sworn, if challenges were allowed without talesmen, and this would produce inconvenience and delay.³ The precept that issues before a sessions of gaol delivery, oyer and terminer, and of the peace, is to return twenty-four, and commonly the sheriff returns upon that precept forty-eight.⁴ It has been held that in trials on the crown side the sheriff may be commanded to return any number the court please, and accordingly in the trial of Sir Harry Vane the sheriff returned sixty.⁵ At common law, it seems the sheriff might have returned above twenty-four, if he pleased; and therefore, by the statute of Westminster the second, c. 38, it is enacted, "That whereas the sheriffs were used to summon an unreasonable multitude of jurors to the grievance of the people, it is ordained that henceforth in one assize no more shall be returned than twenty-four;" but this had no reference to criminal cases.⁶

According to this practice in common law, it has been decided in the courts of the United States, that it is not error if the marshal return a greater number than sixty, that being

¹ Patterson's case, 6 Mass. 486.

² Anonymous, 1 Pick. 196.

³ Co. Litt. 155 a.

⁴ 2 Hale P. C. 263.

⁵ Kelyng, 16.

⁶ Ibid.

the number returned on the panel in the State where the jury was summoned.¹

This, however, is only the case where the matter is not regulated by statute, when the common law governs; but it is now wholly under statutory regulations in our different States; and the summoning of a less number than that ordered will be good ground for quashing the array; but it has been held if a greater number be returned, it is not such an injury as a prisoner can complain of, as it is then in his favor, he having a greater latitude of selection.²

§ 138. *Special Venire*. — It must be a power inherent in every court to be able to issue a special *venire*, whenever there has been a default or failure in the return, or when the array of the first panel is quashed. Accordingly, under the common law and our statutes this power is exercised.³ It is, however, in some cases limited. It is only, in some States, where there is a total default of jurors on the return that a special *venire* can issue; and if but one appear, and he be set aside on challenge, talesmen must be summoned, instead of issuing a *venire* for another panel.⁴

In Illinois a special *venire* may issue when there are no jurors in attendance. Thus, when it appeared by stipulation in a criminal case, that there being no jury in attendance on court summoned according to law, and it was ordered that a special *venire* issue, to try the case, and the defendant objected thereto, it was held that the precise contingency existed to authorize the court to issue a new *venire*.⁵

The Michigan statute⁶ provides: "Whenever from any cause grand or petit jurors shall not have been drawn and summoned to attend any circuit court, or a sufficient number of qualified jurors shall fail to appear, such court may in its dis-

¹ United States v. Insurgents, 2 Dall. 335; United States v. Fries, 3 Ib. 515.

² Anderson v. State, 5 Ark. 445. Where the prisoner objected to a juror on the ground that the sheriff summoned fifty-six persons when he was ordered to summon forty-eight, and the court sustained the objection, set aside the whole return, and directed another *venire facias*, it was held that the prisoner had no right to complain of such direction. Epes' case, 5 Gratt. 676.

³ Shaffer's case, 1 How. (Miss.) 238.

⁴ Fuller v. State, 1 Blackf. 63.

⁵ Blemer v. People, 76 Ill. 265.

⁶ Comp. Laws, § 4374.

cretion, order a sufficient number of grand and petit jurors, or both, to be *forthwith* drawn and summoned to attend such court." Under this it was objected that a special *venire* could not be issued to summon for a future adjourned day; but it was held that the court could rightly exercise this power.¹

The New York Revised Statutes direct that "when twenty-four jurors, duly drawn and summoned, do not appear, or when by reason of there being one or more juries impanelled, &c., there shall not remain twenty-four ballots containing the names of jurors then attending, the court shall order the sheriff to summon from the bystanders, or from the county at large, so many persons qualified as shall be necessary to make at least twenty-four jurors;² and an act of 1870, c. 409, authorized a circuit court or court of oyer and terminer, whenever the public interests required a greater number of petit jurors than are required to be drawn and summoned, to enter an order on its minutes requiring the clerk of the county to draw, and the sheriff to summon a number specified, not exceeding thirty-six. It was held that these statutes are cumulative, that is, the mode pursued under the former may be still adopted; and accordingly, when a precept was issued for the summoning of one hundred jurors for the trial of a person indicted for murder, when twenty-four names were not in the box, though it was not expressly ordered they should be taken from the body of the county, that the order was properly made.³

The California Code provides that whenever there is a failure, or a deficient number of jurors, the court may order a sufficient number to be forthwith drawn and summoned to attend the court; or it may by an order entered on its minutes direct an elisor elected by the court or the sheriff of the county to summon forthwith so many good and lawful men, as the case may require.⁴

§ 139. Excusing or discharging Jurors. — An important

¹ *People v. Jones*, 24 Mich. 215. See *Wilson v. State*, 42 Ind. 224.

² 2 Rev. Stat. 733.

³ *People v. Mallon*, 3 Lans. 224; *Bennett v. Matthews*, 40 How. Pr. 428.

⁴ Code Proced. § 226; *People v. Devine*, 46 Cal. 46; *People v. Davis*, 47 Cal. 93.

question sometimes arises as to the power of the court to excuse or discharge one or more jurors summoned to attend the trial of a cause. The discretion, it is well known, is given; but it is very evident the right can be so exercised as to work an injury to the prisoner.¹ It is more frequently exercised and less complained of in civil cases; but on many occasions in criminal cases, when it has happened that one or more jurors were discharged without the prisoner's consent, it was decided to be error, and a new trial has been awarded. Thus, the discharge of a jurymen, without legal grounds therefor, after he has been selected in a criminal case, entitles the defendant to a *venire de novo*. But serious illness in a juror's family has been deemed sufficient to entitle a juror to be discharged even in a criminal case; but unless the case shows an emergency of this kind it will be error, as where two were discharged on the ground of sickness in their families.² The principle on which the right is denied, is that having furnished the prisoner with a list of the panel which is summoned for his trial, it works an injury to him to discharge jurors against his consent, thus restricting his right of challenge. And where on the calling of the names of jurors as returned on a *venire*, the court failed to issue attachments against absentees, but required the jury to be selected from those who appeared, it was decided to be erroneous, and the prisoner's rights were violated.³

But the court by the consent of the prisoner and prosecuting officer in a criminal case before the jury are sworn may discharge two jurors;⁴ and if a juror says he has conscientious objections to capital punishment the court may of its own motion discharge him.⁵

¹ In excusing jurors from serving the court should exercise careful discretion, but when there is no abuse thereof shown, and the action of the court below is not such as to violate the essential nature and security of the trial by jury, or to deprive a party of substantial rights, the Supreme Court will not review it. *State v. Ostrander*, 18 Iowa, 435; *Hines v. State*, 8 Humph. 597; *Grable v. State*, 2 Greene (Iowa), 559.

² *Parsons v. State*, 22 Ala. 50; *Paunell v. State*, 29 Geo. 681. The excusing of a juror should always be done publicly in open court; and the time when and reason entered upon the minutes. *State v. Whitman*, 14 Rich. L. (S. C.) 113.

³ *Boles v. State*, 24 Miss. 445.

⁴ *Nolen v. State*, 2 Head (Tenn.), 520.

⁵ *Mansell v. Queen*, 8 Ellis & B. 54. See *McGuire v. State*, 37 Miss. 369.

On the trial of an indictment for felony, a juror may at the request of the prosecuting officer be directed to stand aside but shall be again called when the panel is exhausted.¹

It is improper to allow a juror excused by the court to substitute another juror in his place on the panel; but the objection must be taken at the time the vacancy was so filled.² If after a jury in a criminal case is selected, one of the number is discharged by the court, the prisoner is not entitled to a full panel of jurors; he is only entitled to the number allowed if the juror had not been selected.³

On a trial for murder in Ohio, where one of the panel summoned by the sheriff is excused on his own application, it is not error in the court to refuse to order the sheriff to summon another in his place before exhausting the panel.⁴

There is not the same strictness required in civil cases; and therefore the discretion of the court to excuse or discharge jurors is seldom questioned. So it is proper for the court to allow a juror who resides in the same town with the defendant to leave the panel before the commencement of the trial, and supply his place with another.⁵ And while the plaintiff's counsel in a civil action was opening the case to the jury, one of the jurymen was taken ill, it was held proper for the court to discharge him, and put another from the panel in his place.⁶

§ 140. The court may discharge a juror for manifest unfitness or impropriety, even without the request or consent of either party; as when a juror is physically unfit to serve from deafness;⁷ and where the court being satisfied by inspection that a juror is drunk, and there being no dispute as to the fact, he may be set aside by the court;⁸ and when a juror is ignorant of the language in which the proceedings are held.⁹

¹ *Jewell v. Commonwealth*, 22 Penn. St. 94; *Warren v. Commonwealth*, 37 Penn. St. 45.

² *State v. Howard*, 10 Iowa, 101.

³ *Lewis v. State*, 3 Head (Tenn.), 127.

⁴ *Martin v. State*, 16 Ohio, 364.

⁵ *Commonwealth v. Hayden*, 4 Gray, 18.

⁶ *Foot v. Silsby*, 1 Blatchf. 445.

⁷ *Jesse v. State*, 20 Geo. 156.

⁸ *Thomas v. State*, 27 Geo. 287.

⁹ *People v. Arceo*, 32 Cal. 40.

And so may a juror be discharged, who from a settled conviction as to the constitutionality of an act under which a prisoner is tried, is manifestly incompetent; or who may have conscientious scruples as to a conviction of a prisoner involving capital punishment.¹ The causes justifying a court in setting aside a juror of its own motion, are well stated in *Montague v. Commonwealth*,² where it is held, that on a trial for felony the court, without the suggestion of either party, but by its own motion, may excuse or set aside a juror who is competent in all other respects, but who from disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing, or other like cause, is disabled physically from performing the duties of a juror; but the erroneous exercise of this power is a matter of exception by the prisoner, and is a ground for a reversal of judgment.

It constitutes no valid ground for challenging the array, that the judge excluded from the special jury some who were unquestionably improper to try the cause.³

§ 141. *Talesmen*. — When a sufficient number of jurors fail to attend after being summoned by the sheriff, or when the number is reduced by challenges or exemption, the deficiency is generally made up by summoning *so many* of the bystanders as will be necessary to complete the panel.⁴

Those summoned in this manner are sometimes known by the title of a *tales de circumstantibus*, or more commonly as *talesmen*. The first mention of the term in a statute occurs in 35 Hen. VIII. c. 6, where it is enacted that in civil causes, the justices, upon request made by the party, plaintiff or defendant, shall have authority to command the sheriff to name and appoint, as often as need shall require, so many of such able persons of the county then present at the assizes, or *nisi prius*, as shall make up a full jury, which persons shall be added to the former panel, and their names annexed to the same. And by 4 & 5 Ph. & M. c. 7, the same rule was ex-

¹ *Commonwealth v. Austin*, 7 Gray, 51; *Marsh v. State*, 30 Miss. 627; *Lewis v. State*, 9 S. & M. 115.

² 10 Gratt. 767; *State v. Marshall*, 8 Ala. 302; *Waller v. State*, 40 Ala. 325.

³ *Inskeep v. Lecony*, Coxe (N. J.) 39. As to this, see *Boggs v. State*, 45 Ala. 30; *Lyman v. State*, *Ibid.* 72.

⁴ 3 Bl. Com. 364; 1 Chitty C. L. 518.

§§ 142, 143. JURY: HOW SELECTED AND SUMMONED. 192

tended to criminal trials and actions upon penal statutes. In England the proceedings in respect of a *tales de circumstantiis* are now regulated by the statute 6 Geo. IV. c. 50, s. 37.

§ 142. They are summoned to supply a deficiency, and not when there is a total default of jurors summoned on the *venire*.¹ And if one juror only appear and he is challenged, a *tales* should then be granted, and twelve new jurors may in this manner be ultimately returned to try the defendant.² Thus, when all the regular panel but one had been excused, a party demanded a jury trial, and insisted upon having the regular jury. The sheriff, however, was ordered to fill up the panel with talesmen; and the cause was tried by a jury composed of the eleven so summoned and the one remaining of the original panel. It was held that this was a proper direction of the court.³

In Indiana, when the regular panel of jurors are engaged in the trial of a cause, the court may direct the sheriff to call bystanders, or go upon the streets, or into the county, and summon other jurors.⁴

The practice of summoning persons from the bystanders to complete a jury is not so much favored or pursued as formerly. It was found to encourage a class of professional jurymen, who have so frequently come under the censure of the courts, and who cannot be depended on to make efficient or faithful jurors. Therefore, in many of our States, late statutes have directed a drawing from the general list of jurors. An example of this is a late amendment in California. It is there directed that a sufficient number of persons having the qualification of jurors shall be summoned from the body of the county, and *not from the bystanders*.⁵

§ 143. Number summoned. — In capital cases, the *tales* may be granted for a larger number than the original process, in order to prevent the delays that may arise from peremp-

¹ 10 Co. Rep. 104; 1 Chitty C. L. 519.

² 1 Chitty C. L. 519; Fuller v. State, 1 Blackf. 63; Wallace v. Columbia, 48 Maine, 436.

³ Emerick v. Sloan, 18 Iowa, 139.

⁴ Bradley v. Bradley, 45 Ind. 67; Shaw v. Wood, 8 Ind. 518.

⁵ Code Proc. § 227.

tory challenges.¹ Thus, it is said in a case in North Carolina, "The law is silent as to the number of talesmen which a sheriff must summon; it therefore belongs to the court in its discretion to determine the number, and should it not do so, the sheriff is left to summon such number as he may deem necessary."² This point was brought before the court in New York, under the statute which provides: "When twenty-four jurors duly drawn and summoned do not appear, . . . or for any other reason there shall not remain twenty-four ballots containing the names of jurors then attending, the court shall order the sheriff to summon from the bystanders, or from the county at large, so many persons, qualified to serve as jurors, as shall be necessary to make at least twenty-four jurors, from whom a jury for the trial of the indictment may be selected."³ On the arraignment of a person for murder, it appeared there were but fifteen out of forty-five who answered to their names, and thereupon an order was made that the sheriff forthwith summon from the county *three hundred* persons duly qualified to serve as jurors. The array was challenged by the prisoner because so large a number had been summoned; but the court decided that the number summoned was in the discretion of the court, saying: "How many are necessary for this purpose must often depend on the probable state of public sentiment with regard to the prisoner, and other like circumstances, the force of which can be best appreciated by the court where the cause is tried."⁴

In other cases less than capital, it was held that the number should be only what was required to make up the panel. Hence, when nine jurors had been obtained in a case, and the prisoner had peremptorily challenged fifteen, it was contended that eight should be summoned, to give him the remaining three, and allow him five more challenges; but the court decided that it was proper to summon but three.⁵

There being several capital cases on the docket at the beginning of the term, the court directed the sheriff to summon

¹ 1 Chitty C. L. 519.

² *State v. Lamon*, 3 Hawks, 175.

³ 2 Rev. Stat. 733, § 3.

⁴ *People v. Colt*, 3 Hill, 432; *McGuffie v. State*, 17 Geo. 497. See *State of Louisiana v. Gallagher*, 26 La. An. 46.

⁵ 1 Chitty C. L. 519; *Burk v. State*, 2 Harr. & J. 426.

a large number of citizens to be in attendance as talesmen to fill up the panel, and it was held that this was proper, and was calculated to secure an impartial jury, and was no ground for a new trial.¹

§ 144. The qualifications of talesmen must be those required in the regular jurymen, and the prisoner has the same power of objecting to them that he has to the original panel, if he has any ground for challenge for cause, or for a peremptory challenge.² In Massachusetts, in a capital case, one called as a talesman cannot be sworn as a juror, unless the court are satisfied that his name is contained in the jury box;³ but in Maine the contrary is held under their statute.⁴

In North Carolina it is no objection to a tales juror that his name does not appear on the jury list as made out by the county commissioners, and a challenge for that cause was properly overruled.⁵

A person who has been on the original *venire* and challenged cannot be sworn as a talesman.⁶

But if they are not qualified, the objection must be made at the time they are placed on the panel; it cannot be made afterwards.⁷

In Ohio a person called as a talesman can be challenged, if he has served as a tales juror at the same term and heard the evidence in the case, where the jury were discharged without a verdict.⁸

¹ Bird v. State, 14 Geo. 43; O'Connor v. State, 9 Florida, 215.

² Burn's Justice (Jurors), III.

³ Commonwealth v. Knapp, 10 Pick. 579.

⁴ State v. Wright, 53 Maine, 328.

⁵ Lee v. Lee, 71 N. Car. 139.

⁶ Parker v. Thornton, 1 Str. 640.

⁷ Commonwealth v. Gee, 6 Cush. 174.

⁸ Famulener v. Anderson, 15 Ohio N. S. 473. It is irregular for a talesman to sit in any cause except the one for which he is returned. Howland v. Gifford, 1 Pick. 43, note 2.

Where one hundred tales jurors were summoned, and, after the original panel was exhausted, the court ordered the names of thirty-six tales jurors to be put into the box, and that number was also exhausted; the court then ordered the remainder to be drawn from, the prisoner making no objection; and it was held the proceeding was a correct one, as the prisoner had in fact an opportunity to have tendered to him all the tales jurors. State v. Nash, 8 Ired. 35. It is not

error for the court to refuse to send for talesmen who have been properly summoned and called into court, but who are not present; others may be summoned to take their places. *Lingo v. State*, 29 Geo. 470. Where the jury cannot be completed by talesmen from among the bystanders, recourse may be had to other persons not within the presence of the court. *State v. Bunger*, 14 La. An. 461. For when they come into court they are bystanders. *State v. Lamon*, 3 Hawks, 175.

CHAPTER V.

IMPANELLING AND SWEARING.

PART I. CHALLENGING IN GENERAL.

- § 145. Importance of the Process.
- § 146. Challenging : Object.
- § 147. Right an Ancient One.
- § 148. Several Kinds of Challenge.

PART II. CHALLENGE TO THE ARRAY.

- § 149. A Challenge to the Array.
- § 150. To the Array for Principal Cause.
- § 151. To the Array for Favor.
- § 152. Right restricted in American States.
- § 153. Allowed when.
- § 154. Denied when.

PART III. PEREMPTORY CHALLENGES.

- § 155. The Right of.
- § 156. Number allowed in English Law.
- § 157. Right in United States Courts.
- § 158. Number allowed in American States.
- § 159. Right in Favor of the State.
- § 160. Construction of Statute 33 Edw. I.
- § 161. Right now exercised by State.
- § 162. Right to increase Number.
- § 163. Right in Civil Cases.
- § 164. Number when Prisoners tried jointly.
- § 165. When Challenge should be made.

PART IV. CHALLENGE FOR CAUSE.

- § 166. Nature of.
- § 167. Distinction of Challenge.
- § 168. Principal Causes of Challenge.
- § 169. Interest — Public or Corporate.
- § 170. Interest — Private.
- § 171. Want of Statutory Qualifications.
- § 172. Alienage.
- § 173. Age as a Cause.
- § 174. Relation or Kindred.
- § 175. Personal Hostility.
- § 176. Bias or Prejudice.
- § 177. Social or Business Relations.

- § 178. Conscientious Scruples.
- § 179. Conscientious Opinions.
- § 180. Opinions in reference to Parties or Subject-matter.
- § 181. Intent of the Law as to.
- § 182. Nature of Opinion to disqualify.
- § 183. A Previous Opinion.
- § 184. An Hypothetical Opinion.
- § 185. Opinions in regard to Source or Foundation.
- § 186. Character of Opinion most considered.
- § 187. Opinion must be fixed.
- § 188. Statutory Provisions.
- § 189. Service on a Previous Jury.
- § 190. Previous Service may not disqualify, when.
- § 191. Challenge to the Favor.
- § 192. Triers, how appointed.
- § 193. How they act.
- § 194. Challenges, when taken.
- § 195. Questions to Jurors in challenging.
- § 196. Questions tending to disgrace.
- § 197. As to Religious or other Preferences.
- § 198. Waiver of Challenge.

PART V. SWEARING THE JURY.

- § 199. Form of Oath.
- § 200. When Jury decide the Law and Fact.
- § 201. Meaning of the Term "Issue joined."
- § 202. Greater Strictness in Criminal Cases.
- § 203. When Objections should be made.

PART I. CHALLENGING IN GENERAL.

§ 145. Importance of the Process. — There is no process in connection with the jury demanding so much scrutiny and circumspection as the impanelling of the jury¹ — the obtaining twelve duly competent, impartial men to try the issue; and just at this point the greatest efforts are made by the parties to detect any who are likely to be unfair, or biased, or inimical to either side, and to secure such as may be relied on to give an unprejudiced examination to the facts involved in the issue. And the law, for this purpose, affords every facility and safeguard; tolerates the most searching inquiry, at the expense of much delay and inconvenience; and assists with its authority to elicit the facts, and the disposition of mind of those proposed as jurors, so that a judgment can be formed as

¹ The word "impanelled," used with reference to the organizing of a jury, means its final formation by the court. It is the act that precedes the swearing of the jury, and which ascertains who are to be chosen. *State v. Reid*, 20 Iowa, 413.

to their fitness for the responsible duty required of them. Up to this time, the process has been merely general; it has only taken at large from the general body of citizens those *likely* to possess the desired qualifications; it has been done in such a manner as to preclude any undue influence or favoritism in the selection; and a body of citizens have been returned on the panel possessing the general characteristics, but too often possessing the common frailties, prepossessions, and deficiencies of the society from which they are taken. It then becomes the object of the law to guarantee all possible efficiency and integrity to the trial, to select from these twelve "good and true men."

§ 146. Challenging: Object. — For this purpose, the jurors are subjected to a critical examination and inquiry to ascertain their disposition as to either party, their relation to the matter at issue, and their competency to act impartially. This is effected by means of "challenges," which on this account take a prominent place in law, and have ever received the most careful consideration. The quality and character of the jury no less than the number, are fundamental; the law is as careful to secure one as the other; both are indispensably necessary for the integrity of the institution. How admirably and aptly is this expressed in the twenty-ninth article of the Bill of Rights in Massachusetts, where it is said: "It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." It was also well expressed in a case when it was said: "Each party in any suit has the right to have the jury composed of persons who are not related to either, who have no interest in the cause, who have neither formed nor expressed any opinion, who are free from bias or prejudice, and who stand indifferent to the result of the verdict."¹

Whether this can be attained or not may be doubted; for a human institution must necessarily partake of the ordinary human foibles and shortcomings; at best we can only approximate to a body of men such as the law in the abstract contemplates. We can never secure from general society as it is now constituted, a body of men entirely free from partiality,

¹ *Ingersoll v. Wilson*, 2 W. Va. 59.

impression, or bias ; at best, we can only get as near to this as we can by discrimination and scrutiny. The day is fast disappearing when men are required to come into a jury box entirely and absolutely free from any impression, and even opinion, as to matters of general notoriety. We are now coming to the recognition of a fact, that must have been long ago apparent, that it is preposterous to expect men moving in general society as it is to-day, to be unimpressed and uninformed as to current and striking events. This is well expressed in a very recent case in Pennsylvania,¹ where the court said : " We must either recede, and go back to the practice of an age when ignorance of passing events constituted a characteristic of the times, and exclude every juror who has formed any opinion, even the slightest ; or we must stand abreast with the present age, when every remarkable event of to-day is known all over the country to-morrow, and exclude those whose opinions are so fixed as to be prejudgments, or have been formed upon the known evidence in the cause. It is needless to say the world moves and carries us with it, and if we lag behind we must commit the trial of the most important causes in life to those so ignorant, their dark minds have never been smitten by the rays of intelligence."

§ 147. **Right an Ancient One.** — This right of challenge must necessarily accompany the trial by jury as a necessary incident. It is found to have been used very far back in our history. It was even in use among the Romans in criminal cases, as the *Lex Servilia* (B. C. 104) enacted that the accuser and the accused should severally propose one hundred *judices*, and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime.

The tenant in Glanville's time could object for good cause to any of the members of the assize ;² and from Bracton we learn that a person on trial might, if he had sufficient cause to suspect any of the jurors as improperly influenced towards him, object to their serving, and have them removed.³ Even the judge could be objected to, according to the old law of

¹ *O'Mara v. Commonwealth*, 75 Penn. St. 424.

² *Glanv.* 2, c. 12.

³ *Bract.* 3, c. 22.

England.¹ And in the civil law the judge could be excepted to in the same way as we now except to jurors, for relationship, or previous connection with the subject-matter, partiality, or prejudice.² But it soon ceased to be permitted in our courts; and on that account the four knights who elected the grand assize were not challengeable; "for that," as Coke says,³ "they be judges to that purpose, and judges or justices cannot be challenged." By statute of 25 Edw. III. c. 3, it was allowed to be a good challenge for cause if a grand juror was on the trial jury; the statute provided: "No indictor shall be put upon inquests upon deliverance of the indictes of felonies or trespass, if he be challenged for such cause by him who is indicted."

§ 148. *Several Kinds of Challenge.* — Challenges may be divided first into two classes: 1. Challenges to the *array*; and 2. Challenges to the *polls*. A challenge to the *array* signifies a challenge to the whole jury as *arrayed* in the *panel*, or little squares of parchment on which the jurors' names were formerly written; a challenge to the *polls* is directed to the jurors individually, to particular persons or *heads* in the *array*.⁴

Each of these two classes are further subdivided: Challenges to the *array* may be for *principal cause* or for *favor*. Challenges to the *poll* may be *peremptory* where no cause is assigned; and for *principal cause*, and for *favor*. Challenges to the *polls* are reduced to four heads by Coke;⁵ these are *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*; an explanation of which is given

¹ Bract. 5, c. 15; Fleta, 6, c. 37.

² Wharton's Cr. Law, § 2945.

³ Co. Litt. 294 a. The British judiciary can boast of some noble examples of judicial impartiality and independence; a memorable instance occurred in the life of Sir Matthew Hale, in the turbulent period of Oliver Cromwell. He had, when he was protector, ordered that certain persons, on whose subseviency he could trust, should be returned as a jury in a case in which he was much concerned. The judge, Sir Matthew Hale, on being informed of this, examined the sheriff, and having ascertained the fact, he dismissed the jury, and would not try the cause. Cromwell was highly displeased with him, and on his return from the circuit, told him in great anger, "that he was not fit to be a judge." Hale replied, with great aptness of expression, "*that it was very true.*" Foss, Judges of England, p. 320.

⁴ 1 Chitty Cr. L. 533; Co. Litt. 155 b.

⁵ 1 Inst. 156.

by Blackstone.¹ But this latter classification is not now regarded. Peremptory challenges, and challenges for cause, are those that are practically of importance.

PART II. CHALLENGE TO THE ARRAY.

§ 149. A challenge to the array is based on the partiality or default of the sheriff, coroner, or other officer that made the return, and is made in writing.² And although there is no personal objection against the clerk or sheriff, yet if the panel was made up at the nomination or under the direction of the parties interested, this is a good cause of challenge to the array.³ And in a case where a particular officer in fact returns a jury, but the sheriff returns it as of himself, this is a good cause of challenge to the array for default in the sheriff.⁴ There can be no challenge to the array or the polls before a full jury appears.⁵

§ 150. To the Array for Principal Cause. — There are two kinds of challenge to the array; namely, a principal challenge, and for favor. A principal challenge is founded on some manifest, decided cause of partiality, which amounts in judgment of law to a conclusive objection to the return; while the grounds of the latter are less certain, and may or may not be sufficient, as they are connected with other circumstances to set aside the array; and the facts are generally

¹ 3 Bl. Com. 361, 362. In a note to *Pringle v. Huse*, 1 Cowen, 432, there is a very full and accurate description of these several challenges as given by Blackstone.

² 3 Bl. Com. 359; *People v. Doe*, 1 Mann. (Mich.) 451; *Suttle v. Batie*, 1 Clark (Iowa), 141; *People v. Welch*, 49 Cal. 174; *Burn's Jus.* 868. It must be certain and specific. *Conkey v. Northern Bank*, 6 Wis. 447. When a challenge is made in writing the following is an approved form: "And now at this day, to wit, &c., come the aforesaid A., the plaintiff, and B., the defendant, by their attorneys; and thereupon the aforesaid B. challengeth the array of the panel aforesaid; because he saith that the panel was arrayed by one —, now and at the time of making the array aforesaid, sheriff of the said (city and) county of —, which said sheriff is not only a kinsman of the aforesaid A., the plaintiff, but that he has intentionally omitted in that panel some of the jurors drawn by the clerk of the county for the same" (or as the fact and circumstances may happen to be), "and this he is ready to certify; wherefore he prayeth judgment, and that the said panel be quashed." *Edwards' Juryman*, p. 89.

³ 3 Bl. Com. 358; *McDonald v. Shaw, Coxe* (N. J.), 6.

⁴ 1 Inst. 156 a.

⁵ *Trials per Pais*, 146, 175; *Rex v. Edmonds*, 4 Barn. & A. 471

left to triors.¹ The principal causes of challenge are not very numerous. The following are given by Chitty in his Criminal Law as grounds for a principal challenge to array.

If the sheriff be the actual prosecutor of the party aggrieved, the array may be challenged, though no objection can be taken in arrest of judgment. So if the sheriff be of actual affinity to either of the parties, and the relationship be existing at the time of the return;² if he return any individual at the request of the prosecutor or defendant; or any person whom he believes to be more favorable to one side than the other; if an action of battery be depending between the sheriff and the defendant, or if the latter have an action of debt against the former; if the sheriff, or his bailiff who makes the return, is under the distress of the party indicting or indicted, or has any pecuniary interest in the event, or is counsel, attorney, servant, or arbitrator in the same cause.

Where a challenge to the array was taken because the sheriff who made the return had continued in his office for more than three months, and had not taken the oaths, and subscribed the declaration required by a certain act, and by that act his office was void for all intents and purposes before he made his return, the array was challenged, but it was disallowed by the court, for he must be taken as sheriff *de facto*; and it was said if such a challenge were allowed, no trial could be had, unless the party were ready to show the sheriff had qualified.³

§ 151. A challenge to the array for favor cannot be definitely fixed. It depends upon some supposed bias or partiality

¹ Bacon, Ab. Juries (E).

² Consanguinity, how remote soever, between the sheriff or juror, and either of the parties, or affinity with the cousin of the sheriff or juror is sufficient as a principal challenge. Bacon, Ab. Juries (E). Thus, the array was quashed when the sheriff who returned the jury was a brother to one of the parties. *Munshower v. Patton*, 10 Serg. & R. 334. It is not a good ground of challenge to the array that the sheriff who summoned them is a son of the prosecuting attorney, no proof being offered that he was not indifferent or impartial. *State v. Cameron*, 2 Chand. (Wis.) 172. A challenge to the array because the constable is related to the plaintiff is not confined to relationship within the third degree. *Vanauken v. Beemer*, 1 South. 364. Being a cousin in the eighth or ninth degree is sufficient. *Dyer* 319 a, pl. 13.

³ Case of Sheriff of Bucks, 2 Vent. 58.

in the returning officer ; and the grounds of it are obviously various, and sometimes undistinguishable from those of a principal challenge. Of this Bishop remarks:¹ " The line which separates the challenge for principal cause and the challenge to the favor, must be either very artificial or very uncertain. In this country, therefore, the distinction has not been much regarded ; in some of our States, it is believed, there have never been triors, but all challenges of both kinds have been decided by the judge ; and in various States where it was not so at first, it has become so by force of statutes ;² so that though the American law is not quite uniform, it is the more general course in this country for the judge to hear all objections in the nature of challenge for principal cause, or challenge to the favor." So that practically the distinction is not much observed, and the principles on which they rest are not easily stated. It will be convenient to state some of the causes for which a challenge to the array has been allowed. We cannot in many cases define the grounds, beyond stating generally, that the facts were deemed sufficient to show a want of fairness in the officer returning the jury, or a *probable*, though not actual bias, from certain relations or circumstances in which the officer stood to the parties.³

§ 152. Right restricted in American States. — Various causes of challenge to the array have been allowed in England, that would have no weight with us ; for there the officer is allowed a discretion and discrimination in making up the jury, which under our procedure cannot be exercised. Hence the causes for setting aside an array here are not numerous. In New York the right is very much restricted ; the statute provides : " It shall not be a good cause of challenge to the panel or array of jurors, in any cause, that they

¹ Crim. Proced. §§ 905, 906.

² An example in point is a recent law of New York (c. 427, Laws 1873), which provides : " All challenges of jurors, both in civil and criminal cases, shall be tried and determined by the court only." The Arkansas statute provides in like manner. Gantt's Dig. § 3700.

³ Thus, when the defendant is the sheriff's tenant, or where there is affinity, but no relationship, between the sheriff and one of the parties, or where they are united in the same office, in these cases there may be a challenge for favor. Dyer, 367 a.

were summoned by the sheriff, who was a party, or interested in such cause, or related to either party therein, unless it be alleged in such challenge, and be satisfactorily shown, that some of the jurors drawn were not summoned, and that such omission was intentional.”¹ Nor is it a cause of challenge, if the clerk of the county who drew was a party or interested, or was counsel for, or related to either party.² And in California a challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or on the intentional omission of the sheriff to summon one or more of the jurors drawn.³ The Michigan statute is exactly in the terms of the New York statute as to the occasion of a challenge to the array.⁴ In Minnesota a challenge to the panel can be founded only on a material departure from the forms prescribed by law, in respect to the drawing and return of the jury.⁵

The reasons for denying this challenge to the full extent as it is exercised in England are thus obvious; for with us the sheriff is in this respect a purely ministerial officer, and he has therefore but little opportunity to act partially or unfairly. Even in England the right of challenging the array is becoming limited. Having given this general outline as to the occasions when a challenge to the array is allowed in our States generally, we shall notice in the next two sections more specifically, instances where this challenge has been allowed or denied.

§ 153. Allowed: when. — In the first instance, the person challenging the array must be strictly prepared to prove the cause, and if he omit to challenge, he cannot take advantage

¹ 2 Rev. Stat. 420, § 57.

² Ibid. § 56.

³ Penal Code, § 1059. And a challenge may be made to the panel on account of any bias of the officer summoning which would be good ground of challenge to a juror. *People v. Coyodo*, 40 Cal. 586. See *People v. Welch*, 49 Cal. 174.

⁴ Comp. Laws (1871), §§ 6013, 6014.

⁵ 2 Bissell's Stat. p. 1054. In Oregon no challenge is allowed to the panel. *Laws Oregon*, p. 142. In Indiana no challenge to the array is permitted because of any informality in the impanelling or selecting of the jury. 2 Rev. Stat. (G. & H.) 31.

of the alleged defect afterwards;¹ and it must be specific. So, a challenge to the array, stating that the sheriff "has not chosen the panel indifferently and impartially, as he ought to have done, and that the panel is not an indifferent panel," is bad, as being too general.² It is allowed only when there are a full panel of twelve in the box.³

It is a good ground of challenge to the array, that the sheriff who served the *venire* is a party to the cause;⁴ and that certain of the jurors had not been duly summoned, but that their names had been placed upon the list by the clerk of the court at their own request.⁵

It is cause of challenge to the array, that tales jurors on the panel, and put upon the prisoner, were drawn from the grand jury box by the presiding judge, and the list of names so drawn given to the sheriff with direction to return them as talesmen.⁶

If the board of commissioners fail to have any jurors selected for the second week of a term of the Circuit Court in Indiana, and a jury be impanelled during that week, the array may be challenged.⁷ In New York a challenge to the array lies for partiality or default in the clerk in selecting and arraying the panel.⁸

When the panel of petit jurors is improperly filled, or the jurors improperly selected, the objection should be taken by challenge to the array, or by a motion to quash the order for a tales, and not by a challenge to the polls.⁹ Generally, it is a good ground of challenge to the array, that the officer

¹ *Rex v. Savage*, R. & M. C. C. 51; *Rex v. Sutton*, 8 B. & C. 417; *New York v. Mason*, 4 E. D. Smith, 142.

² *Reg. v. Hughes*, 1 C. & K. 235; *People v. Renfrow*, 41 Cal. 37.

³ *Rex v. Edmonds*, 4 Barn. & A. 471; *Reg. v. Lacey*, 3 Cox C. C. 517; *People v. Russell*, 46 Cal. 121.

⁴ *Woods v. Rowan*, 5 Johns. 133.

⁵ *McClosky v. People*, 5 Park. Cr. 308.

⁶ *Boon v. State*, 1 Kelly, 631.

⁷ *Wright v. Stuart*, 5 Blackf. 120.

⁸ *Gardner v. Turner*, 9 Johns. 261. *Pringle v. Huse*, 1 Cow. 435. In South Carolina it is a good ground of challenge to the array on the trial of a prisoner for murder, that the jury commissioner is a near blood relation of the deceased. *State v. McQuaige*, 5 Rich. 449.

⁹ *Gropp v. People*, 67 Ill. 154.

returning the jury was interested, or guilty of any misconduct in their selection.¹

§ 154. Denied: when. — It may be stated as a general principle, that an irregularity in the drawing of the jury, which cannot affect the rights of the prisoner, is not a ground of challenge to the array. It will not be allowed on the ground that a certain class were excluded in the selection.²

The fact that disqualified persons were summoned on a special *venire*, could not be objected to by a challenge to the array, and it is not a ground to set it aside, unless upon proof of partiality or corruption in the sheriff, and is not a sufficient reason for reversing a judgment.³

That one of twenty-four additional jurors, ordered to be summoned by the court, was, by mistake, one of the thirty-six originally drawn, is no ground for challenging the array in a capital case, when the original panel was not exhausted.⁴ Nor when, in a justice's court, the constable who served the *venire* had appeared and pleaded for one of the parties, and had, at her request, employed an attorney to appear for her at the trial.⁵

The panel will not be set aside when the sheriff who summoned the jury had a remote interest in the cause in controversy. Thus, in New Jersey, on a suit by the board of freeholders of a county against a late county collector and his sureties on his official bond, it is not a good ground of principal challenge to the array, that the sheriff and jurors are inhabitants of the county, and owners of land and other taxable property therein.⁶

In Pennsylvania it was held no cause of challenge to the array, that the sheriff was not present during the whole time, during which the selection of jurors was made; nor is it a good cause of challenge, that the sheriff and commissioners took up between two and three weeks in making the selec-

¹ Quinebaug Bank v. Tarbox, 20 Conn. 510.

² Ferris v. People, 35 N. Y. 125; Friery v. People, 54 Barb. 319; People v. Jewett, 3 Wend. 314.

³ Boles v. State, 24 Miss. 445.

⁴ People v. Thurston, 2 Park. Cr. 49.

⁵ Miles v. Pulver, 3 Denio, 84.

⁶ Peck v. The Freeholder, 1 Spencer, 457.

tion and putting the names in the wheel; nor that the box in which the selected names were put was not locked up, and that it was possible thereby to have changed the names, there being no evidence to justify a suspicion that the names were changed.¹ And it is no cause of challenge to the array, that but forty-eight jurors were summoned, one of whom was not qualified.²

Under the code of Alabama, a challenge to the array, or a plea in abatement to the panel, demands an inquiry only as to whether the jury has been selected in the mode directed, and, on such issue, the certificate of the board is conclusive.³

PART III. PEREMPTORY CHALLENGES.

§ 155. The right of peremptory challenge is deemed a most essential one to a prisoner, and is highly esteemed and protected in law. It is the right to exclude from the panel those who may be suspected of entertaining a prejudice against a party where sufficient reasons cannot be given for their exclusion for cause.⁴ It has been established in legal procedure for a long time, and the right could be exercised to the number of thirty-five, one less than three full juries, up to 22 Hen. VIII. It was, however, only given in trials for treason and felony;⁵ and at the present time it is not permitted in Eng-

¹ *Commonwealth v. Lippard*, 6 S. & R. 395. For the method of selection, see ch. 4.

² *Foust v. Commonwealth*, 33 Penn. St. 338.

³ *State v. Brooks*, 9 Ala. 9. Under the code of Iowa, which provides for a challenge to the array in a criminal case, but is silent as to civil cases, it has been questioned whether a challenge to the array would be permitted in a civil case. *Suttle v. Batie*, 1 Clark, 141. The relationship of the sheriff who summoned the jury was a good ground of challenge to the array, which ought to have been made before the jury were sworn, or, at least, before trial. A venire might then have been directed to the coroner. It was too late to raise the objection on a motion for a new trial, without showing any excuse for the failure to make the challenge at the proper time. *Rector v. Hudson*, 20 Tex. 236. After a challenge to the polls, a party cannot challenge the array. *Co. Litt. 158 a*. In Louisiana it is not a good cause to challenge the array, that a number of jurors actually drawn at any time was not the exact number required by law. Code (1870), § 2130.

⁴ Peremptory challenges are those which are made to the juror without assigning any reason, and which the courts are compelled to allow. 1 Chitty Cr. L. 534.

⁵ *Co. Litt. 156*.

land in civil cases.¹ The reason for fixing on thirty-five as the number, is thus given by Bacon: "And this was because the trial by the petit jury came instead of the ordeal, and the petit jury of twelve being after the manner of the canonical purgation, and because the whole *pares* were not on his jury, but only a select number was chosen by the criminal himself, as was usual among the canonists, therefore they took a middle way, and gave the defendant liberty to challenge peremptorily any number under three juries, four juries being as many, as generally appeared, to make the total *pares* of the county."²

§ 156. Number allowed in English Law. — The number allowed by the common law was changed by statute 22 Hen. VIII. c. 14, by which no person assigned for petit treason, high treason, murder, or felony can be admitted peremptorily to challenge more than twenty of the jurors. And by the statute 33 Hen. VIII. c. 23, the same restriction is extended to cases of high treason, which was not included in the former statute. Another change took place by the 1 & 2 Ph. & M. c. 10, which enacted that *all* trials for treason should be carried on as at common law, and it was therefore generally agreed that this statute restored the right to challenge thirty-five in trials for treason as it existed formerly at common law;³ but as to all other felonies the number of peremptory challenges was fixed at twenty.

§ 157. Right in United States Courts. — The act of Congress passed on the 20th July, 1840, confers upon the courts of the United States the power to make all necessary rules and regulations for conforming the impanelling of juries to the laws and usages in force in the States.⁴ This power includes that of regulating the challenges of jurors in cases both civil and criminal, with the exception in criminal cases of treason

¹ Creed v. Fisher, 18 Jur. 228; Marsh v. Coppuck, 9 C. & P. 480.

² Ab. Juries (E. 9).

³ 3 Inst. 227; 2 Hale P. C. 269; Fost. 106, 107.

⁴ United States v. Shackelford, 18 How. 558. The act of Congress of July 20, 1840, prescribing how jurors in the United States shall be designated, does not require a minute adherence to the state practice on that subject by the United States courts. U. S. v. Collins, 1 Woods, 499.

and other crimes of which the punishment is declared to be death. While it was agreed that as to the mode of selecting the jurors the practice in the United States courts should conform to that of the States where the jury were impanelled, it was not at the same time generally held that the *impanelling* should entirely conform thereto, and that therefore the challenges should be regulated by state laws. This was the case in *United States v. Douglas*,¹ where Nelson, J., held, that the act of 1840 did not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause; while Betts, J., held to the contrary. All questions in regard to this are now settled by the late United States Revised Statutes, which provide: "When the offence charged is treason, or a capital offence, the defendant shall be entitled to twenty, and the United States to five, peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party, for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to the individual jurors for cause or favor, shall be tried by the court without the aid of triors."²

§ 158. The number allowed in our States will be found in criminal cases to vary between thirty-five, the highest, and six. We propose in some general classification to refer to the statutory provisions of the States in reference to peremptory challenges. In the first place, a large majority of them allow twenty peremptory challenges to the defendant in capital cases, and where the punishment is imprisonment for life. The other States vary in this respect, and to these we refer particularly.

In Alabama a defendant in a capital case is entitled to twenty-one; for a felony less than capital, fifteen; for a misdemeanor, six peremptory challenges.³

¹ 2 Blatchf. 207.

² Rev. Stat. § 819.

³ Rev. Code (1867), § 4178.

In Kentucky each party is allowed to challenge peremptorily to the number of one fourth the jury summoned.¹

In Maine, in a capital case, the person on trial can challenge ten jurors peremptorily while the panel is being formed, and one more before the trial.²

In Massachusetts twenty peremptory challenges are allowed the defendant in a capital case, and by a statute of 1862, two more from the panel before the trial begins.³

In Michigan, in a capital case, thirty are allowed the defendant, and fifteen to the State.⁴

In Mississippi, in capital cases, twelve are allowed the defendant, and six to the State; in other cases, four are allowed the defendant.⁵

In Nevada, in capital cases, and where the punishment is imprisonment for life, the defendant is allowed ten, and the State five, peremptory challenges; in other cases, five to the defendant and three to the State.⁶

In New York, in capital cases, the people and accused have thirty peremptory challenges.⁷

In North Carolina, in capital cases, twenty-three are allowed the defendant, and the State four.⁸

In Ohio twenty-three are allowed the defendant in capital cases.⁹

In Oregon, in capital cases, or in imprisonment for life, twelve are allowed the defendant, and six to the State; in other cases, six to the defendant.¹⁰

In Rhode Island, in either a civil or criminal case, either party may challenge a number not exceeding one in six, without alleging any cause, by a writing addressed to the clerk.¹¹

In Tennessee, in a capital case, the defendant is allowed thirty-five, and the State ten, peremptory challenges; in other

¹ Gen. Stat. (1873) p. 572. See *Buford v. Commonwealth*, 14 B. Mon. 20.

² Rev. Stat. (1871) p. 887.

³ Gen. Stat. c. 172, § 4.

⁴ Comp. Laws (1871), § 7951.

⁵ Rev. Code (1871), § 2761.

⁶ Laws of Nevada, § 1960.

⁷ Laws 1872, c. 475.

⁸ Rev. Code (1855), p. 234.

⁹ 2 Rev. Stat. 1181.

¹⁰ Laws Oregon, p. 360.

¹¹ Gen. Stat. (1872) p. 434.

cases less than capital, the defendant has twenty-four, and State ten, over the grade of petit larceny.¹

In Virginia and West Virginia there are no peremptory challenges allowed; but the defendant is allowed to strike off eight from the list furnished him.²

In Wisconsin, in cases where the punishment is imprisonment for life, twenty-four are allowed to the defendant, and six to the State; in other cases four to the defendant and the same to the State.³

In Vermont every person who shall be arraigned and put on trial for an offence punishable with death, or by imprisonment in the state prison for a term of seven years or more, shall be permitted peremptorily to challenge six of the jurors, and such further number as he can show good cause for challenging; and no peremptory challenge is allowed the State.⁴

§ 159. Right in favor of the State.—By the common law the prosecution in criminal cases could exercise on behalf of the crown peremptory challenges to an unlimited extent, without alleging any other reason than “quod non boni sunt pro rege.”⁵ It is stated, however, in Wharton’s Criminal Law, that “at common law the government has no peremptory challenges.”⁶ This is evidently contrary to the best authorities, namely, Coke, Hawkins, and Chitty. Bishop holds directly the opposite; for he quotes Chitty as showing the king could challenge as many as he thought fit.⁷

By the statute of 33 Edw. I. c. 4, this right was restricted, and it was provided that in all “inquests to be taken before any of the justices, and wherein our lord the king is a party, . . . notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain

¹ Stat. 1871 (Thompson & Steger), §§ 4013, 4014. See *State v. Humphreys*, 1 Overton, 306.

² Virg. Code (1860), p. 836; W. Va. Code, p. 718.

³ Taylor’s Stat. p. 1940. There the death penalty is abolished.

⁴ Gen. Stat. tit. 34, c. 120, § 4.

⁵ Co. Litt. 156 b; 2 Hawk. c. 43, § 2; 1 Chitty C. L. 533; Bacon Ab. Juris (E).

⁶ Section 2956.

⁷ Crim. Proced. § 936.

- untaken for that cause; but, if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court."

§ 160. *Construction of the Statute.*—In the construction of this statute, it was clearly settled that, the words being general, it applied to all cases, civil or criminal, in which the king was a party.¹ Notwithstanding the evident design of the statute was to deny any right of peremptory challenge to the king, yet judicial construction so enlarged it that a privilege was allowed the crown to set aside a juror, without showing any cause, until the panel was exhausted, when, if the full number was obtained, the juror was not called, but, if not, his name was afterwards called in the general list.² This privilege was frequently too liberally exercised in favor of the crown, and on many occasions it was attempted to limit or abolish it; but the judges refused to interfere with a practice that had so long been settled and acquiesced in. In the trial of Frost for treason,³ his counsel, Sir F. Pollock, made a vigorous but an ineffectual attempt to have this privilege denied. The case is fully reported in 1 Mod. State Trials. The court replied to the objection thus: "As to the former objection, which is a question of law, are we really called upon, after a construction has been put upon this act of Parliament from the very period when it was passed, in the 33 Edw. I., down to the present time, to put a construction different from that which prevailed at the time the statute was enacted, and different from that which all our predecessors have put? Where would be the certainty of the law of England?"⁴ The construction, therefore, became settled, and

¹ Bacon Ab. Juries (E).

² Bacon Ab. Juries (E); 1 Chitty C. L. 534; 4 Bl. Com. 353; *Rex v. Parry*, 7 C. & P. 836.

³ *Reg. v. Frost*, 9 C. & P. 136.

⁴ "On the trial of O'Coigley and others for high treason, before Mr. Justice Buller, at Maidstone in 1798," says Mr. Townsend (1 Mod. State Trials, 99 n) "the leading counsel for the prisoner, Mr. Plumer, Mr. Dallas, and Mr. Gurney, declined to interpose when the crown were exercising their peremptory right of challenge to different jurymen. At length the junior counsel, Mr. W. Scott,

the same practice was introduced here, and this privilege given to the prosecution where the right of peremptory challenge was denied to it by statute.¹

§ 161. Right now given to State. — It would be a serious drawback to the administration of justice, if the State could not exclude jurors from the panel, against whom the prosecuting officer may not at the time be ready to show a cause for challenge, but who, nevertheless, are notoriously known to favor the prisoner, or to be united with him in some relationship. Of this it is remarked by the compilers of the Penal Code in Pennsylvania:² "In the practical administration of criminal justice the right of the Commonwealth to challenge peremptorily four persons is of the deepest importance; it is not an uncommon thing to find in a panel of jurors, one or more persons pledged to the defendant by personal or social sympathies, or influenced in his favor by worse motives; the right to peremptorily challenge four jurors is the security of the public against such contingencies."

Acting on this principle, the prosecution in a majority of our States has a right of peremptory challenge to a limited amount, generally half the number allowed the prisoner, and in a few cases the same number; and where it is not expressly granted judicial construction favors by implication the privilege, if it can in any way be granted. Thus, in New York, under the Revised Statutes, it was not allowed; but by a law

jumped up, 'I must be chained down to the ground, my lords, before I can sit here, engaged as I am for the life of one of the gentlemen at the bar, and submit to these challenges of the crown without cause. The crown has now challenged eleven jurors without cause, a greater number, I believe, than was ever known before' (in Ireland it is usual to challenge fifty at least)." The reply by Mr. Justice Buller was, "In every case you have quoted, you cannot help seeing a decision against you." "The true construction of the statute is in favor of the right of challenge, and there is no case, no period in which a different determination has been made. It appears to me one of the clearest points that can be made."

¹ *United States v. Wilson*, 1 Bald. 81; *State v. Arthur*, 2 Dev. 217; *State v. Craton*, 6 Ired. 164; *State v. Stalmaker*, 2 Brev. 1; *Jewell v. Commonwealth*, 10 Harris, 94; *Wormely v. Commonwealth*, 10 Gratt. 658; *Commonwealth v. Joliffe*, 7 Watta, 585. The prisoner has no right to postpone showing cause of challenge to a juror, and to have him stand aside until the panel is finished, this being entirely the privilege of the State. *State v. Bone*, 7 Jones Law (N. C.), 121.

² See Pardon's Dig. p. 256.

of 1847 it was provided that, "upon the trial of any issue or issues of fact, joined in a civil action, each party shall be entitled peremptorily to challenge two of the persons drawn as jurors for such trial. The second section gives to a person arraigned and put on trial, for any offence not punishable with death, or with imprisonment in a state prison ten years or a longer time, a right peremptorily to challenge five of the persons drawn as jurors for such trial, and no more; except that on trials in a court of special sessions the right was limited to two. A construction was placed on this act as giving the prosecution a right to challenge peremptorily the same number, namely two, as in civil cases, but in two other cases it was denied.¹ However, all questions as to this are now set at rest in that State, by a recent statute, which enacts: "On the trial of all felonies and misdemeanors, the prosecution shall be entitled to the same number of peremptory challenges as are or may be by law given to the defence:"² and the same right is allowed the people in Illinois.³ In California, in capital cases, and where the punishment is imprisonment for life, the State has ten, half the number of the defendant's peremptory challenges; in other cases five are allowed.⁴

§ 162. The right to increase the number of peremptory challenges by the prosecution has been questioned, as interfering with a prisoner's right to a fair and impartial jury. Thus, a statute of New York,⁵ in capital cases, gave the State five peremptory challenges, and it was objected at the trial that it was unconstitutional to confer this right, which had not been exercised at the time when the Constitution was adopted and the right of trial guaranteed. The court held the right could be constitutionally given, saying, "The subject of peremptory challenge has always been under legis-

¹ *Waterford & Whitehall Turnpike v. People*, 9 Barb. 161; *People v. Caniff*, 2 Park. Cr. 586; *People v. Masters*, 3 Ib. 517. Contra, *People v. Henries*, 1 Park. Cr. 579; *People v. Atchinson*, 7 How. Pr. 241.

² Laws 1873, c. 427.

³ Rev. Stat. (1874) p. 411.

⁴ Penal Code, § 1070. In Missouri, in criminal cases, the State may challenge peremptorily three jurors. *Malison v. State*, 6 Mo. 399. In Indiana six are allowed the State in capital, three in other cases. *Wiley v. State*, 4 Blackf. 458.

⁵ Rev. Stat. (G. & H.) 408.

⁶ Laws 1858, c. 332.

lative control, and it is only within a comparatively recent period that the right has been extended even to the accused in a minor class of criminal offences. Even if it were a right given by common law, it could be restrained, limited, or withheld altogether at the legislative will."¹ The same was held in Pennsylvania under similar legislative provisions.² But while this may be admitted as affecting the trials of crimes committed *after* the passing of a law giving a right of peremptory challenge, or a greater number, to the prosecution, it may be questioned whether such a law could apply in the trial of such crimes as were committed *before* the passage of the act. It was held, however, in Kentucky, that it applied to prosecutions pending at the time as well as those commenced afterwards.³ In this case the question was very fully examined by the counsel and the court, and it being contended that such a law was in fact *ex post facto*, it was held this term could not be applied, as it related to *crimes*, and not to criminal *proceedings*, which could be regulated by the legislature so as to affect a crime committed previously. An analagous point was raised in the trial of Stokes for murder in New York, and the court held that a law which regulated the mode of challenging a jury was constitutional.⁴

§ 163. The right to challenge peremptorily in civil cases is not so generally given, and we have shown in a former section, is not allowed in England.⁵ The right, however, is becoming more extended and recognized here, and late enactments have given it where it did not exist before. Thus, in Vermont by an act passed November 4, 1869, it is provided :

¹ *Walter v. People*, 32 N. Y. 147.

² *Warren v. Commonwealth*, 1 Wright, 45; *Hartzell v. Commonwealth*, 4 Wright, 463. See *Creiger v. Bunton*, 2 Strobb. 487; *Jones v. State*, 1 Kelly, 610.

³ *Walston v. Commonwealth*, 16 B. Mon. 15. See *Reid v. State*, 20 Geo. 681.

⁴ *Stokes v. People*, 53 N. Y. 164. In regard to such decisions, Bishop says (*Crim. Proced.* § 940, note): "It is not probable that the soundness of this view will ever be doubted; yet, on the other hand, suppose the statutes should take away all peremptory challenges from the prisoner, and permit them to the State to an unlimited extent; or to an extent very great though limited; or even where they are entirely taken away from the prisoner to any extent; the question presented would be a different one. I do not mean to intimate how it should be decided." We have sufficient confidence in our judiciary, to feel sure how it would be decided in case of any marked preference given to the prosecution, or any rights withheld from the prisoner.

⁵ *Vide* § 155.

"That upon the trial of any civil cause in the county court, each party shall be permitted peremptorily to challenge two of the jurors."

The number allowed is generally fixed between two and four. In Massachusetts, New Hampshire, Connecticut, and New York, two such challenges are allowed in civil cases. In Connecticut a complaint under the statute of forcible entry and detainer is regarded as a civil remedy, and on the trial of such complaint, each party has the right of challenging, peremptorily, two jurors.¹

The act in New York, giving the right of peremptory challenge upon the trial of an issue of fact joined in a civil action, does not apply to summary proceedings by the landlord against the tenant to obtain the possession of demised premises.² Two or more parties joined in a civil action can only challenge two jurors in all and not two each.³ In a civil action of trespass for assault and battery, where there has been but one trespass, the defendants, though they plead severally, are entitled to only three peremptory challenges.⁴

Formerly in Pennsylvania two were allowed in a civil action, but now four are allowed by a law of 1860.⁵ Under the former statute it was decided that it did not extend to viewers provided for in the same statute.⁶

In Iowa, in a civil action, each party can challenge five peremptorily.⁷ This is believed to be the highest number allowed in a civil action. In Alabama four are allowed in a civil action.⁸

In California each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.⁹

¹ *Quinebaug Bank v. Tarbox*, 20 Conn. 510. A party to a proceeding for the reassessment of damages to land is entitled. *Pettis v. Pomfret*, 28 Conn. 566.

² *People v. Hamilton*, 39 N. Y. 107.

³ *Stone v. Segur*, 11 Allen, 568; *Snodgrass v. Hunt*, 15 Ind. 274.

⁴ *Sodonsky v. McGee*, 4 J. J. Marsh. 267.

⁵ Pamph. L. 344; *McDermott v. Hoffman*, 70 Penn. St. 31.

⁶ *Schuylkill Nav. Co. v. Farr*, 4 Watts & S. 362.

⁷ Code (1873), § 2771.

⁸ Code (1867), § 2666.

⁹ Code Proc. § 601. An action of debt to recover a penalty is to be regarded as a civil suit, and either party may exercise the right of challenge given by South Carolina act of 1841. *Kleinback v. State*, 2 Speers, 418.

§ 164. Number where Prisoners jointly indicted.— When the right of challenging exists, though several defendants are tried on the same inquest, each individual has a right to the full number of his challenges; but if they refuse to join in their challenges, they must be tried separately, in order to prevent the delay which might arise from the whole panel being exhausted.¹ Hale says: “And if twenty men were indicted for the same offence, though by one indictment, yet every prisoner should be allowed his peremptory challenge of thirty-five persons.”

This rule is very strictly adhered to in this country; it is such an unquestioned right, the wonder is there could ever have been any objection to it. However, if the prisoners choose to be tried together, each is not then allowed his full number of challenges.² It is optional, it is claimed, with the court, either to grant them separate trials or try them jointly.³ If, however, they are tried jointly under this discretion of the court, each must be allowed his full number of peremptory challenges.⁴

It is not good ground of arrest of judgment where two prisoners have been indicted and tried jointly by the same jury, that they had peremptorily challenged but twenty jurors between them; for if they wished the privilege of challenging twenty each, they should have claimed it at the bar.⁵

But no matter how many are tried on the same indictment, the prosecuting officer is only entitled to his challenges for one, and cannot claim them for all.⁶

In New Hampshire, in the trial of crimes whose punishment is less than death, or imprisonment for life, when parties are tried on a joint indictment, they are not each entitled to his full number of challenges.⁷ This is held under the statute in that State, which provides that either party in all civil

¹ 1 Chitty C. L. 535; 2 Hale P. C. 268.

² *People v. Thayers*, 1 Park. Cr. 595; *People v. McCalla*, 8 Cal. 301.

³ *United States v. Marchant*, 4 Mason, 158; *United States v. Gibert*, 2 Sumner, 19; *People v. Vermilyea*, 7 Cow. 138.

⁴ *Bixbie v. State*, 6 Ohio, 86; *Brister v. State*, 26 Ala. 107; *Washington v. State*, 17 Wis. 147; *Hill v. State*, 2 Yerg. 246.

⁵ *State v. Monaquo*, Charlt. 16.

⁶ *Schoeffler v. State*, 3 Wis. 823; *Mahan v. State*, 10 Ohio, 223; *State v. Earle*, 24 La. An. 38.

⁷ *State v. Reed*, 47 N. H. 466.

actions, and the respondent in all criminal causes, not capital, shall, in addition to challenges for cause, have two peremptory challenges; and "party" is here construed as in civil cases. This is not quite in harmony with the decisions generally. And instead of *restricting* a prisoner's right, it should be the object of a court in construction to *enlarge* it, if the terms of the statute do not forbid it.

§ 165. When Challenge should be made. — The time when a peremptory challenge should be made, is before the jury are sworn.¹ If the juror take the book to swear, without it being tendered him, the right is not thereby defeated.² After the administration of the oath, it then lies in the discretion of the court whether a peremptory challenge shall be allowed or not.³

In Massachusetts the right, if it be exercised, must be taken before the jurors are interrogated by the court concerning their bias and opinions.⁴ In some places it is not allowed after the jury have been tendered to the prisoner and accepted, even if they have not been sworn.⁵ Thus, on a trial for murder, before the jury were sworn but after the panel was complete and accepted, the respondent asked leave to challenge a juror peremptorily, he not having challenged the whole number allowed, but leave was refused, and it was held that this was not erroneous.⁶

The passing by individual jurors when they are called is no waiver of a challenge. So when the commonwealth being allowed four peremptory challenges, they can be used at any time during the formation of the panel.⁷

The fact that a prisoner did not avail himself as he might, of a peremptory challenge to exclude a juror, does not prevent

¹ Co. Litt. 158; 2 Hale P. C. 274; Jackson v. Pittsford, 8 Blackf. 194; Wyatt v. Noble, 8 Blackf. 507; Spencer v. De France, 3 Iowa, 216; People v. Kohle, 4 Cal. 198.

² Reg. v. Frost, 9 C. & P. 129, 136.

³ People v. Reynolds, 16 Cal. 128; People v. Tweed, 13 Abb. Pr. N. S. 371; State v. Anderson, 4 Nev. 265.

⁴ Commonwealth v. Webster, 5 Cush. 295; Commonwealth v. Rogers, 7 Met. 510.

⁵ Jones v. Venzandt, 2 McLean, 611; Harbach v. State, 43 Tex. 243.

⁶ State v. Cameron, 2 Chand. (Wis.) 172.

⁷ Hartzell v. Commonwealth, 4 Wright, 462.

him from taking advantage of an error committed on the trial of the challenge for cause, though it appears that his peremptory challenges were not exhausted when the impanelling of the jury was completed. He is entitled to have his challenges for cause determined according to law, and to make or withhold his peremptory challenges according to his pleasure.¹ But in case he had challenged peremptorily, not having exhausted his peremptory challenges, the exception to the juror could not afterwards avail.²

A peremptory challenge is a personal privilege that cannot be exercised by a volunteer, in the absence of the accused, and without his authority.³ Hence Hawkins says: "Having premised that the prisoner must take all such challenges himself, even in such cases wherein he may have counsel; and also that before any juryman is brought to the book, the prisoner by leave of the court may have the whole panel once called over in his hearing, that he may take notice who do and who do not appear, in order the better to enable him to take his challenges."⁴

PART IV. CHALLENGES FOR CAUSE.

§ 166. *Nature of.* — The law intends that as far as possible jurors shall go into the jury box entirely unbiassed, impartial, and indifferent; and therefore every exertion is made to exclude all who, from their actual relations to either party or to the issue, or who have previously formed a fixed opinion in re-

¹ *People v. Bodine*, 1 Denio, 281; *Hooker v. State*, 4 Ohio, 348.

² *McGowan v. State*, 9 Yerg. 184; *Stewart v. State*, 8 Eng. (Ark.) 720; *Friery v. People*, 2 Keyes, 224.

³ *Steele v. Commonwealth*, 3 Dana, 84.

⁴ 2 Hawk. c. 43, § 4. The right of peremptory challenge is a right not to select but to reject. *State v. Wise*, 7 Richards, 412; *State v. Smith*, 2 Iredell, 402. Where a statute gives the right of peremptory challenge to a prisoner put on trial "for an offence punishable with death or imprisonment in a state prison ten years or any longer term," a person indicted for burglary in the second degree, which is punishable "by imprisonment in a state prison for a term not more than ten years nor less than five years," is entitled to peremptory challenges. *Dull v. People*, 4 Denio, 91. It is sufficient, if a person may be punished, though he do not actually receive the full extent permitted by law. In California, in a civil case, a party is not bound to exercise his right of peremptory challenge until there are in the jury box twelve persons whom the court has adjudged competent. *Taylor v. Western Pacific R. R. Co.* 45 Cal. 323. In a trial for murder, the defendant is entitled under the Missouri statute to a full panel of forty qualified jurors before he can be compelled to make his peremptory challenges. *State v. McCarron*, 51 Mo. 27.

spect to the matter in issue, cannot be expected to give an impartial consideration to the questions submitted to them. For the purpose of discovering those so disqualified a rigid and searching inquiry is allowed previous to the acceptance of the juror. This is usually done by the examination of the juror himself, under oath — on his *voir dire*, as the phrase is; but in addition to this, witnesses can be called to testify to any fact tending to show the incompetency of the juror. The examination of jurors on the *voir dire* is looked upon by the practitioner as a very critical period of the procedure, when the greatest circumspection and discrimination are to be exercised. Accordingly we find the process lengthened to a tedious and exasperating extent in trials of great importance, as for instance in the impanelling of the jury in the late trial of Tilton v. Beecher, when the examination was extended over a period of four days, and twenty-four jurors were examined on a challenge for principal cause.¹

There are two conditions that render a juror incompetent to sit in a trial, and these are, first, those relations in which he may be found to the parties or the cause, independent of his own volition; and secondly, a state or condition with reference to the disposition of his own mind as to the parties or the subject-matter of the controversy. The law makes a division into such causes as are termed *principal*, and those for *favor*.²

§ 167. *Distinctions of Challenge.* — These two divisions of a challenge for cause have existed for a long time, and have on many occasions been confounded; for the dividing line between them is very indistinct, and sometimes purely arbitrary; so that one would be puzzled often to distinguish one from the other. So unsatisfactory is the separation and boundary line between them, that of late the distinction is in many places abandoned, and in others practically disregarded.

¹ See Abbott's Report, vol. 1.

² The division made in the Penal Code in California has the merit of clear distinction and classification; by § 1071, a challenge for cause is of two kinds: 1. General, that the juror is disqualified from serving in any case. 2. Particular, that he is disqualified from serving in the action on trial. As Coke expresses it, "A principal challenge is of two sorts, either by judgment of law without any act of his, or by judgment of law upon his own act." Co. Litt. 175.

It was not founded on any philosophical distinction ; it rested mainly on the *method* of determining such challenges ; the principal challenge being tried and determined by the court, and that to the favor by *triors*. The examination by *triors* is not favored ; for in a majority of our States it has been abandoned ; and late statutes have abolished the method in other States. Thus, a late statute of New York has provided :¹ "All challenges of jurors, both in civil and criminal cases, shall be tried and determined by the court only. Either party may except to such determination, and upon a writ of error or *certiorari*, the court may review any such decision, the same as other questions arising upon the trial."²

We have adverted in a former section on the challenge to the array, to the distinction between the principal challenge and a challenge to favor.³ We may say further, that a principal challenge to the polls is founded on a cause of bias or partiality, which, if admitted or proved to the satisfaction of the court, will, as a matter of law, render the juror incompetent. As an illustration, it is held that a fixed and definite opinion is a ground for a principal challenge, and to be passed upon by the court ; an opinion or belief short of that is sufficient for a challenge to the favor, and a question for the *triors* to determine.⁴ When a challenge for principal cause is interposed, the grounds thereof must distinctly appear, so that the opposite party may demur ; and so the appellate court may be able to review the decision of the court below.⁵

¹ Laws 1873, c. 427.

² This practically abolishes the distinction between the challenges. And it is held in *Holt v. People*, 13 Mich. 234, the distinction is there practically abolished.

In the New England States, as a rule, the challenges are determined by the court. It was held by the learned author of an article upon this subject in 12 Am. Jurist, 330, that this has been the mode generally adopted in Massachusetts. By c. 84, Laws 1862, the Supreme Judicial Court is permitted to prescribe the manner in which the right of challenge shall be exercised. In California, up to 1872, if the facts were denied the challenge must be tried by the court if for implied bias ; by *triors* if for actual bias ; but by the amendments of 1873-74, the court is to try all challenges. Penal Code, § 1078. In Georgia, the court tries all challenges. Code 1873, p. 847. So in Iowa, Code 1873, p. 463 ; Arkansas, Gantt's Digest, § 1917 ; Ohio, 1 Rev. Stat. 754 ; and Virginia, Code 1860, p. 836.

³ Vide § 150.

⁴ *People v. Hayes*, 1 Edm. (N. Y.) Sel. Cas. 582 ; *People v. Stout*, 4 Park. Cr. 71 ; *Ex parte Vermilyea*, 6 Cow. 555 ; *Sprouce v. Commonwealth*, 2 Virg. Cas. 375 ; *People v. Rathbun*, 21 W. nd. 509 ; *State v. Howard*, 17 N. H. 121.

⁵ *Schoeffler v. State*, 3 Wis. 823 ; *Mann v. Glover*, 2 Green, 195 ; *Freeman v. People*, 4 Denio, 31 ; *Rex v. Edmonds*, 4 B. & C. 471.

As to this it is said in *Mann v. Glover*, last cited: "A party cannot make a principal challenge or a challenge to favor by giving it a name. A challenge, whether in writing or by parol, must be in such terms that the court can see, in the first place, whether it is for principal cause or to the favor, and so determine by what forum it is to be tried; and secondly, whether the facts, if true, are sufficient to support such challenge." And it is further said, he must "state why the juror does not stand indifferent, he must state some facts or circumstances which, if true, will show either that the juror is positively and legally disqualified, or create a probability or suspicion that he is not or may not be impartial. In the former case the challenge would be a principal one, triable by the court; in the latter, it would be to the favor, and submitted to triors."

§ 168. **Principal Causes of Challenge.** — The following is an approved statement from Chitty,¹ as to what was deemed principal causes of challenge: "If, therefore, the juror is related to either party within the ninth degree, though it is only by marriage, a principal challenge will be admitted. So also if he has acted as godfather of the prosecutor of the defendant, he may be challenged for that reason. And it will be no answer to such a challenge, that he is also related to the other party, because, by the terms of the writ, he ought to be akin to neither. Thus, also, if the juryman be under the power of either party, or in his employment, or if he is to receive part of a fine upon conviction, or if he has been chosen arbitrator, in case of a personal injury for one of the parties, or has eaten and drank at his expense, he may be challenged by the other. So if there are actions depending between the juryman and one of the parties which imply hostility, that will be a ground of principal challenge, though other actions only warrant challenges to the favor. And, in general, the causes of this nature which would justify a challenge to the array on the ground of the presumed partiality of the sheriff will be sufficient exceptions to an individual juror. If a juryman has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant, with a malicious intention on evidence of those facts, he will be set aside."

¹ 1 Chitty C. L. 541.

There is an admirable and concise summary given by the court, as deduced from the various authorities, in *Fleming v. State*.¹ They are: 1. That the juror is interested in the pending or a similar suit; 2. That he does not possess the statutory qualifications; 3. That he is of kin to one of the parties; 4. Personal hostility; 5. A pending law-suit between the juror and the party; 6. That the juror is a master or servant, landlord or tenant of the opposite party, or has eaten or drank at his expense since being summoned as a juror, or has promised to find a verdict for him; 7. That he has formed or expressed an opinion in the cause, is a witness in it, or had been a juror in a former trial of it.

We shall adopt these divisions in the sections following, as to challenges for cause.

§ 169. *Interest—Public or Corporate.*—The law lays down the broad proposition that an interest of a juror, in the matter involved, renders him incompetent. This must evidently have some limits; for it is not every degree of interest that will disqualify; and hence it is a matter of determination on many occasions as to what degree of interest will be sufficient to exclude one from the jury. It is plain that there must be some degree of remote interest in the subject-matter, that ought not to be considered as rendering a person incompetent, as where the citizens of a county having to pay taxes, sue for some pecuniary demand that may benefit the county.² But in some places where the district is limited, and where the citizens may be supposed to have a closer and more intimate interest, it has been held they were incompetent.³

¹ 11 Ind. 234.

² *Bassett v. Governor*, 11 Geo. 207; *Phillips v. State*, 29 Geo. 105; *Commonwealth v. Ryan*, 5 Mass. 90. In Vermont, on a criminal complaint before a justice of the peace, an inhabitant of the town to which the penalty will accrue is competent. *Middletown v. Ames*, 7 Vt. 169.

³ The inhabitants of St. Louis are not competent as jurors in a case in which the board of directors of the public schools of that city is a party. *Fine v. St. Louis*, &c. 30 Mo. 166; *State v. Williams*, 30 Maine, 484; *Mayor, &c. of Columbus v. Goetchins*, 7 Geo. 139. A resident and tax-payer of a city is incompetent to serve as a juror when the city is interested, except in a suit for a penalty or forfeiture. *Diveny v. Elmira*, 51 N. Y. 506; *Eberle v. The Board, &c. St. Louis Public Schools*, 11 Mo. 247; *Wood v. Stoddard*, 2 Johns. 194; *Russell v. Hamilton*, 2 Scam. 56; *Flagg v. City of Worcester*, 8 Cush. 69; *Davenport, &c. Co. v. Davenport*, 13 Iowa, 229. In an action to which an incorporated city is a party,

And a degree of interest in a corporation by a juror where the corporation is a party, is sufficient ground of challenge to such juror.¹ In an action against an insurance office, it is no objection against a special juror being sworn, that he is a director of another insurance office, unless that office has granted a policy on the life in question, and the amount of that policy be unpaid.²

The society of freemasons, being a purely charitable body, a member has no such pecuniary interest in a case to which the society is a party, as will disqualify him from acting as a juror.³

Members of an association combined for enforcing a particular law, or for checking a certain grievance, are not competent where the matter is in controversy in a suit, either to enforce a remedy or impose a penalty.⁴ But members of an association to prosecute offences against certain laws, and who are liable for expenses according to the amount of their subscriptions, are not incompetent when they have not paid in their subscriptions.⁵ And members combined to check a certain crime, are not therefore incompetent, because that is an interest that ought to be common to every citizen.⁶ In actions between the trustees of different religious denominations involving the right of possession to lands, the members of each denomination are by reason of interest incompetent to act as jurors.⁷

§ 170. *Interest—Private.*—A very small degree of private or personal interest, either as connected with the subject-

the court has the discretion to admit or exclude from the jury tax-payers of such city. 21 Iowa, 565; *Bailey v. Trumbull*, 31 Conn. 581; *Garrison v. Portland*, 2 Oregon, 123.

¹ *Williams v. Smith*, 6 Cowen, 166; *Quinebaug Bank v. Leavens*, 20 Conn. 87; *Page v. Contoocook R. R. Co.* 1 Foster (N. H.), 438; *March v. Portsmouth, &c. R. R. Co.* 19 N. H. 372; *Brittain v. Allen*, 2 Dev. 120.

² *Craig v. Fenn*, 41 Eng. Com. L. 29.

³ *Burdine v. Grand Lodge, &c.* 37 Ala. 478. It is no ground of challenge that the juror is a freemason, in a contest between a mason and one who is not a mason. *Purple v. Horton*, 13 Wend. 9.

⁴ *Commonwealth v. Eagan*, 4 Gray, 18; *Fleming v. State*, 11 Ind. 284; *Pierson v. State*, *Ibid.* 341.

⁵ *Commonwealth v. O'Neil*, 6 Gray, 343.

⁶ *State v. Wilson*, 8 Clarke (Iowa), 407; *Williams v. State*, 3 Kelly, 453.

⁷ *Cleage v. Hyden*, 6 Heisk. 73.

matter in the suit or as affecting a similar matter in another suit, is sufficient to disqualify a juror.¹

Thus, in an action of ejectment by the heirs-at-law of an insolvent debtor, the executor of the deceased is not a competent juror;² and it is good cause for excluding a juror, when he is surety for one of the parties, for a debt not in controversy, which party is insolvent.³ So, the fact that one of the jurors is security for costs in the suit is good cause for challenge; but if the party neglects to avail himself of it, he must be presumed to have waived the objection.⁴

Where a juror swears on the *voir dire* that "he does not know whether he is interested or not," his interest in the suit may be proved *aliunde*.⁵

A juror was challenged in an ejectment suit on the ground that he was interested in a tract of land held by the plaintiff, under a somewhat similar title to the one in controversy; but as it appeared the titles were not quite the same, it was decided that he was competent.⁶

Where it appeared, after trial, that one of the jurors had made a bet of a neck-tie that the result would be in favor of the defendant, a new trial was granted.⁷

§ 171. Want of Statutory Qualifications. — It has been shown in a former section,⁸ that about one third of our States require a property qualification for jury service; that jurors are required to be citizens, electors of the State,⁹ and of good reputation; they must be "good and lawful" men, as the law

¹ *Jeffries v. Randall*, 14 Mass. 205; *Lynch v. Horry*, 1 Bay, 229; *Davis v. Allen*, 11 Pick. 466; *Courtwright v. Strickler*, 37 Iowa, 382.

² *Smull v. Jones*, 6 Watts & S. 122.

³ *Ferriday v. Selser*, 4 How. (Miss.) 506.

⁴ *Bradshaw v. Hubbard*, 1 Gilman, 390.

⁵ *Shannon v. Commonwealth*, 8 Serg. & R. 444; *Bickham v. Pissant*, Coxe (N. J.), 220.

⁶ *Gratz v. Benner*, 13 Serg. & R. 110.

⁷ *Essex v. McPherson*, 64 Ill. 349.

⁸ *Vide* § 115.

⁹ If a person has the constitutional right to vote, though he has not been registered, and has not voted, he is a qualified juror. *Craft v. Commonwealth*, 24 Gratt. 602. In Tennessee, the act of 1866, c. 5, declaring that persons not qualified voters were subject to challenge as jurors, is for that unconstitutional. *Gibbs v. State*, 3 Heisk. 72.

designates them. Consequently, a want of these qualifications will be a good ground of challenge; but it will not, as a general rule, avail after a verdict.

Thus, in Indiana it is a good ground of challenge, that a juror is not a householder;¹ and in Alabama, under the former statute, it was decided that the tenant and occupant, by yearly letting of a room used as a sleeping apartment, is not a freeholder or householder.² A person deeded all his land in trust to a creditor, as a security for the payment of a debt. The day of payment was passed, but the trustee had not sold the land, and the debtor was still in possession; and it was held that he was not disqualified to serve as a grand juror, in Virginia, on the ground that he had no freehold estate.³

When a juror is required to be possessed of a certain amount of real estate, or pay taxes on a certain amount of personal property, he is not qualified, though he has the necessary amount of personal property, when he has not been assessed for it.⁴ He must possess the necessary property qualification at the time of the trial; and it is not sufficient if he had it when placed on the list.⁵

In California, where, in a criminal case, a juror, whose name is on the poll tax list only, is sworn to try the cause, and the defendant receives the juror without objection as to his competency, he cannot be heard after the verdict was rendered to object that the juror lacked the necessary qualification.⁶

§ 172. Alienage has always been a good cause of challenge; and in criminal cases of the higher grade it will be a cause for a new trial.⁷

While the authorities are agreed that the fact of an alien being on the jury will not vitiate a verdict in civil cases, there is a difference of opinion as to its effect in the higher

¹ *Lafayette Plank, &c. v. New Albany R. R. Co.* 13 Ind. 90; *Bradford v. State*, 15 Ind. 347. See *Willey v. State*, 46 Ibid. 363.

² *Aaron v. State*, 37 Ala. 106.

³ *Commonwealth v. Carter* 2 Virg. Cas. 319.

⁴ *Valton v. National, &c. Ins. Co.* 17 Abb. Pr. 268.

⁵ *Kelley v. People*, 55 N. Y. 565.

⁶ *People v. Sandford*, 43 Cal. 29.

⁷ *Schumaker v. State*, 5 Wis. 324; *Guykowski v. People*, 1 Scam. 476; *Hill v. People*, 16 Mich. 351; *Johr v. People*, 26 Mich. 427.

grade of criminal cases. In England, in *Rex v. Sutton*,¹ it was held to be a cause of challenge; but if the party has an opportunity of making it, and neglects it, he cannot afterwards make the objection. This was a trial on an indictment for conspiracy. And the same was held in a capital case in Illinois, where it was said that "parties should ascertain, by proper examination, the competency of jurors, and if they neglect to do so, the verdict will not be disturbed on account of an alleged incompetency of the character mentioned."² And the court in this case, in effect overruled the case of *Guykowski v. People*, *supra*. In *State v. Vogel*,³ the court decided that the exception would be sufficient after verdict only in a capital case. Referring to the decisions, it was said, "Some of these were civil cases; but it appears from them that the same rule prevails in civil and criminal cases not capital. And we can see no well grounded reason for any distinction between the two. It is true that in favor of life, the prisoner in capital cases is held not to waive anything. But the reason of the rule does not exist in other cases, and has never been applied by the courts." This seems to be the safest and most approved doctrine, and will, it is believed, be generally accepted.

§ 173. Age as a Cause of Challenge. — We have in a former section⁴ adverted to this qualification, and it was there shown that it ought not to be a cause of challenge, if a person was older than the age prescribed for exemption, if he is otherwise well qualified. Still, there are authorities that hold it is a good ground of exception, as we there pointed out. Thus, it is held in England that the fact that a juror is over sixty years of age is not a ground of challenge.⁵ And it is held in *Moore v. Cass*,⁶ that the law exempting persons over sixty

¹ 8 Barn. & C. 417.

² *Chase v. People*, 40 Ill. 352.

³ 22 Wis. 471.

⁴ *Vide* § 118.

⁵ *Mulcahy v. Queen*, 1 Ir. Com. Law, 13.

⁶ 10 Kan. 288. In Alabama the list is directed to be made from those having certain qualifications between twenty-one and sixty years of age; but it is laid down, that it is a cause of challenge only, when the juror is over seventy years of age. Code, § 4183. In Georgia it is a cause of challenge by statute, if the juror

years of age from serving on a jury is a favor to a class, and does not render a person over that age incompetent if he choose to waive his privilege.

The decisions, however, are sometimes based on the special provisions of statutes relating to the selection and summoning of jurors. In many there is a list of exemptions, and persons over a certain age are there included; and in such cases the decisions generally hold that the exemption can be waived by the individual, and does not disqualify him. But in other statutes there are directions given as to the class from whom the officers making up the jury list are to select, and there it is often directed that persons between the ages of twenty-one and a certain age are to be chosen. Under this special direction, it might be held a good cause of challenge if a juror was returned who was older than the age prescribed.

§ 174. *Relation or Kindred.* — The law recognizes the controlling influence of kindred as affecting the competency of a juror for indifference and impartiality. Hence, it was laid down as a principal cause of challenge, that a juror was related to either party within the ninth degree, though it were only by marriage.¹ In *State v. Perry*² this rule was thus illustrated: "The great-grandmother of the juror Ray was the sister of the grandmother of the prisoner. . . . From the grandmother were three degrees, and from the great-grandmother four, making in the whole seven degrees, which was a cause of principal challenge on the part of the State."

In this matter the relation by affinity is the same as by consanguinity, but the affinity ceases with the dissolution by the death of one of the married parties of the marriage by which it was created.³ Therefore, where it appeared that the wife of the juror who was challenged was cousin to the prisoner's

is over sixty years of age. Code, § 4681. See *Cohron v. State*, 20 Geo. 752. In *Burroughs v. State*, 33 Geo. 403, it was held sufficient to order a new trial, when a juror was over sixty years of age, which was unknown to the accused until after trial.

¹ 1 Chitty C. L. 541; 3 Bl. Com. 363; *O'Connor v. State*, 9 Fla. 215; *Paddock v. Wells*, 2 Barb. Ch. 331.

² *Busbee* (N. C.), 330.

³ *Bishop Crim. Proced.* § 901.

former wife, who was dead, leaving no offspring, he was held to be competent.¹

But the kindred of the married parties are not in affinity to one another. Thus, the husband during the life of his wife is in affinity to her relations; but his relations are not in affinity to hers. So, in a case of murder, a person called as a juror stated that the sons of his wife by a former husband were second cousins to the deceased, and that his wife was still living; he was held to be competent.²

So, it is no cause of principal challenge that the juror's sister is the wife of the nephew of one of the parties.³ In this cause the court said this would have been a good ground of challenge to the favor before triors on the ground of the intimacy between the parties. But the relation of a juror to one of the counsel is not a disqualification.⁴

The fact that a juror is related to one of the parties by marriage with his niece is a sufficient cause of challenge.⁵ A challenge for relationship must state what the relationship is, and to whom;⁶ and a challenge for this cause must be made before verdict; otherwise it is too late.⁷ But in criminal cases it has been held a good ground for a new trial, where one was related to the prosecutor as cousin.⁸

¹ *State v. Shaw*, 3 Ired. 532; *Dearmond v. Dearmond*, 10 Ind. 191; *Cain v. Ingham*, 7 Cow. 478; *Chase v. Jennings*, 38 Maine, 44; *Jaques v. Commonwealth*, 10 Gratt. 690.

² *Moses v. State*, 11 Humph. 232.

³ *Rank v. Shewey*, 4 Watts, 218.

⁴ *Pipher v. Lodge*, 16 Serg. & R. 214; *Funk v. Ely*, 45 Penn. St. 444.

⁵ *Trullinger v. Webb*, 3 Ind. 198.

⁶ *Stevenson v. Stiles*, 2 Penn. (N. J.) 740.

⁷ *Eggleston v. Smiley*, 17 Johns. 133; *McLellan v. Crofton*, 6 Greenl. 307.

⁸ *Brown v. State*, 28 Geo. 439. The relationship of a juror to the plaintiff in a suit by an administrator is a good ground of challenge. *Balsburgh v. Frazer*, 21 Penn. St. 491. By statute in many of our States, the rule of the common law as to the degree of kindred sufficient to exclude a juror is altered. In California the degree held to disqualify is the fourth. Penal Code, § 1074. The same is the rule in Vermont. *Churchill v. Churchill*, 12 Vt. 661. In Maine a relation of second cousin, or in the sixth degree, disqualifies. Hence, a juror who was cousin of the wife of the defendant, was incompetent; but this not appearing until after the trial, it was not allowed as a good exception. *Hardy v. Sproule*, 32 Maine, 310. In Alabama a challenge is allowed for consanguinity within the ninth degree, and affinity within the fifth, computing according to the rules of the civil law. Code, § 4180.

§ 175. **Personal Hostility.** — If there are actions pending between the jurymen and one of the parties which imply hostility, this will be a ground of principal challenge; though other actions only warrant challenges to the favor.¹

So, it is a ground of principal challenge when a juror has evinced feelings of hostility towards a party.²

On the trial of an indictment for a libel on a public officer, it is ground of challenge, that the jurors had entertained hostile feelings towards the prosecutor, by reason of a transaction touching his official duties.³

§ 176. **Bias or Prejudice.** — This incompetency is more general; as hostility may be based on some particular cause or relation of the parties to the juror, whereas a bias or prejudice has often no special ground, except some repugnance to a person generally; it may be on account of his reputation, antecedents, or sometimes for no reason whatever. Thus, where a juror at the trial of a cause declared in court, that he had such a prejudice resting upon his mind against one of the parties to the case, as would, he feared, prevent him doing him justice, it was held to be error for the court without further examination to pronounce him competent.⁴ But a prejudice of a juror against a person, not a party to a suit, can form no objection to his competency.⁵

After a juror states that he is not sensible of any bias or prejudice in the case, it is not erroneous to refuse a further examination of the juror;⁶ and it is said the mind of the court, and not of the juror, must be satisfied that the challenged juror is free from bias and prejudice.⁷

Wherever there is existing prejudice, it should disqualify; for prejudice is a state of the mind which, in the eye of the law, has no degrees.⁸ So, the objection of bias made to a juror

¹ 1 Chitty C. L. 542; Co. Litt. 157.

² *People v. Jewett*, 4 Wend. 314; *Brittain v. Allen*, 2 Dev. 120.

³ *Coleman's case*, 2 City H. Rec. (N. Y.) 89.

⁴ *McLaren v. Birdsong*, 24 Geo. 265. See *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465.

⁵ *Strawn v. Cogswell*, 28 Ill. 457.

⁶ *Davis v. Hunter*, 7 Ala. 135.

⁷ *Morton v. State*, 1 Kan. 468.

⁸ *People v. Reyes*, 5 Cal. 347.

being once established, it would seem that no possible combination of circumstances can remove the disqualification.¹ It seems that the formation of an opinion as to the general character of the prisoner does not disqualify a juror.²

§ 177. Social or business relations existing between a juror and a party to the suit, render the juror incompetent. As when the juror is under the power of either party, or in his employment, or has drunk or eaten at his expense, since the commencement of the action.³ Hence, the relation of landlord or tenant disqualifies.⁴ So, the relation of attorney and client; but in an English case it was held to be no cause of challenge on behalf of the crown, that the juror is a client of the prisoner, who is an attorney, and that the juror has visited the prisoner as a friend since he has been in prison.⁵

The relation of landlord and tenant between a juror and the bondsman for the prosecution of the suit, is not a disqualification of such juror.⁶

A principal challenge to a juror *propter affectum*, is not supported by evidence that the juror lodges at his own expense, temporarily with the defendant, who is an innkeeper.⁷

In criminal cases the law views with more suspicion and circumspection any favor exhibited by either party to a juror; and even after verdict, it will, if properly evidenced, be a cause for a new trial. Thus, during the progress of a criminal trial, one of the prosecuting counsel kept the horse of a juror over night in his stable, free of charge. Although this was believed not to have influenced the juror's mind, it was held that a verdict of guilty ought to be set aside.⁸

§ 178. Conscientious scruples as to the nature or degree of the punishment are frequently met with in jurors, and

¹ State v. Dumphy, 4 Minn. 438.

² People v. Allen, 43 N. Y. 28.

³ Co. Litt. 157; 1 Chitty C. L. 542; Hathaway v. Helmer, 25 Barb. 29.

⁴ Fipher v. Lodge, 16 Serg. & R. 110; Harrisburg Bank v. Foster, 8 Watts, 304.

⁵ Reg. v. Geach, 9 Car. & P. 499. A juror summoned as a witness for either of the parties is incompetent. Commonwealth v. Joliffe, 7 Watts, 85.

⁶ Brown v. Wheeler, 18 Conn. 199.

⁷ Cummings v. Gann, 52 Penn. St. 484.

⁸ Springer v. State, 34 Geo. 379.

must be a cause of challenge. This is frequently illustrated in capital cases, where the juror is conscientiously opposed to capital punishment. The cases on this subject are very numerous, and, on the whole, show that a juror having such scruples is not competent.¹

In the trial of Webster in Massachusetts, it was held that one who is opposed to capital punishment, and fears that his opinion may influence others of the jury, is, notwithstanding, competent to be sworn as a juror, if he believes he can give an unbiased verdict.² That a juror is "opposed to capital punishment on principle," does not imply that he has a conscientious opinion which would preclude him from finding a prisoner guilty in a capital case.³ But a juror who states that he has conscientious scruples against the death penalty, is within the disqualification declared by statute, and his competency is not restored by his avowal that he would render a verdict of guilty if the evidence required it.⁴

That a juror has a fixed opinion against capital or penitentiary punishments, is good challenge for cause by the State. If he is accepted by the State and afterwards by the prisoner, the State's right of challenge for this cause is lost and cannot be again revived; and if afterwards the juror declares that he has a fixed opinion against penitentiary punishment, and the court orders him to stand aside, the judgment must be reversed.⁵ The ground of this decision was, that when the juror had been accepted by the State and put upon the prisoner, the right of challenge was thus lost to the State, after the prisoner had accepted the juror.

But in a subsequent case in the same State, when a juror was questioned by the court as to his scruples against capital punishment, he said he had a decided opinion against it; but when questioned further, he admitted he could render a verdict

¹ *Martin v. State*, 16 Ohio, 364; *Gross v. State*, 2 Carter (Ind.), 329; *People v. Tanner*, 2 Cal. 257; *White v. State*, 16 Texas, 445; *People v. Wilson*, 3 Park. Cr. 199; *State v. Jewell*, 33 Maine, 583; *People v. Damon*, 13 Wend. 351; *State v. Ward*, 39 Vt. 225; *Driskell v. State*, 7 Ind. 338; *Walter v. People*, 32 N. Y. 147.

² *Commonwealth v. Webster*, 5 Cush. 295.

³ *People v. Stewart*, 7 Cal. 140.

⁴ *O'Brien v. People*, 48 Barb. 274; 36 N. Y. 277.

⁵ *Stalls v. State*, 28 Ala. 25.

if the evidence required it. Notwithstanding, the court of its own motion discharged him, against the defendant's exception, the prosecution having offered no challenge. It was held that the juror was properly discharged by the court, whose duty it was to see that incompetent jurors are not put upon the prisoner or the State, and that a fair and impartial trial is had.¹

It is not easy to harmonize these two decisions; yet in the latter case the court did not refer to the former either to approve or reject it. However, the last decision is more consonant to reason and principle.

§ 179. Conscientious opinions as to the constitutionality of a statute, as to the right to convict on certain kind of evidence, and as to the non-liability of a party charged, are good grounds for the challenge of a juror, especially when the opinion is of such a nature that he cannot convict, no matter what the evidence may be.²

Thus, in *Commonwealth v. Buzzell*,³ the court said "that if the juror should think it was not a crime to destroy the convent in the manner above mentioned, he would entertain a prejudice in the cause;" and the question was asked of the juror, before he was put upon the panel, whether he had expressed or formed an opinion as to the general guilt or innocence of all concerned in the destruction of the convent. In like manner it has been held, in a suit for freedom, to be a valid objection to a juror, that he could not in conscience render a verdict against the claimant.⁴

§ 180. Opinions in reference to Parties or Subject-matter. — No part of the examination of jurors in reference to their competency is so troublesome, and so uncertain, as that which relates to their opinions as to one or other of the parties, or as to the cause to be tried. And on this subject the decisions of the courts have been most unsatisfactory and at all times fluctuating. We need not wonder at this, for in the consideration of the subject an estimate has to be made as to

¹ *Waller v. State*, 40 Ala. 325.

² *Commonwealth v. Austin*, 7 Gray, 51; *Gates v. People*, 14 Ill. 433.

³ 16 Pick. 153.

⁴ *Chouteau v. Pierre*, 9 Mo. 3.

the various operations of the human mind, as to its capacity to rid itself of previous impressions, and to weigh and examine evidence which may counteract those prepossessions, and as to its ability to act either against its predilections or prejudices. In fact, an account has to be taken of psychological phenomena, whose laws we but imperfectly understand, and which do not operate alike in all individuals. Therefore it is, that a uniform rule cannot be very safely laid down; since such rules would include individuals of very various tendencies, capacities, and impressibility. This is well expressed by Scott, J., in *Armistead v. Commonwealth*,¹ where he says: "Some minds are so sceptical, that they receive nothing as true which is not proved by plain or direct evidence, or established upon mathematical demonstration; while others readily adopt the most absurd notions, though unsupported by anything like evidence and destitute of all foundation in reason and in the nature of things. And we not unfrequently find opinions of the latter class as immovable as those which are the result of the most laborious investigation. The mind is, however, in both cases, made up; the question is settled; it is *decided*. And although both classes of persons may say, and believe they say truly, that they are open to conviction, willing to hear evidence and listen to reason, and either adhere to or abandon their opinions as these may dictate, few would be willing to stake their lives and fortunes on the success of an attempt to overturn opinions, which their professors fancy themselves to be thus willing to abandon at the command of truth and justice."

§ 181. *Intent of the Law as to this Competency.* — The intent of the law is evidently that a juror shall come to the consideration of the case unaffected by any previous judgment, opinion, or bias, either as respects the parties or the subject-matter in controversy. When the proposition is laid down in these terms, it will be found comprehensive and general enough for all cases, and will be readily accepted. But while this commands general acquiescence, it is not generally agreed what degree of opinion, or bias, or previous impression, shall be sufficient to render one incompetent, or how this prejudgment is to be formed.

¹ 11 Leigh, 657.

What shall render a juror incompetent in this respect is thus stated by Hawkins:¹ "That he hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like;" then he adds, "yet it hath been adjudged, that if it shall appear that the juror made such declaration from his *knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge.*" The last part of this clause is not accepted as sound in many places; it is supposed to be founded on adjudications where the jurors had the character of witnesses, and for that reason, not adapted to the present constitution of the jury.

The intent of the law was very clearly expressed in *Sam v. State*,² where it is said: "Though no general rules of competency can be fixed, each case depending upon its peculiar circumstances, it may be stated generally, that a juror is incompetent to sit in a case on which his mind is so far prejudiced as to require evidence to annul the opinions he has formed." The limitation is well expressed in another case, where it is stated, "He may not have formed any opinion at all, certainly not an unqualified one. He may have received an impression, but this impression is not enough to disqualify him. A mere suspicion or inclination of the mind towards a conclusion is not enough; the state of mind must be more decided. He must have reached a *conclusion*, like that upon which he would be willing to act in ordinary matters. In other words, we repeat, the effect upon his mind must be more than an impression; it must amount to a conviction, in order to exclude him for *implied bias*."³

Having now given a general idea as to the disqualification arising from a prejudgment of the case, we shall next examine the adjudications of our various States, in reference to this subject more particularly, though not in much detail, but by means of some general classification.

§ 182. Nature of the Opinion to disqualify. — Our Amer-

¹ 2 Hawk. P. C. c. 43, § 28.

² 13 Sm. & M. 189. The law contemplates that each and every juror who sits in a cause shall have a mind entirely free from all bias or prejudice of any kind whatsoever, and if the juror is prejudiced in any manner, he is not a fit or proper person to sit in the box. *People v. Reyes*, 5 Cal. 347.

³ *People v. Reynolds*, 16 Cal. 129. See *State v. Thompson*, 9 Iowa, 188; *State v. Gillick*, 10 Ibid. 98.

ican decisions are various and fluctuating on this point; there could not be any uniform rule reduced from them; each State setting up a standard for itself, and too often judges in the same State holding different rules. However, we can, it is believed, bring the decisions under some general rules, in order to obtain an outline of the policy generally pursued. It could serve no practical purpose, but would rather confuse and embarrass, to give the decisions in each State *seriatim*. It will be found, on the whole, that there is greater agreement than will at first be suspected. To come, then, directly to the question; there are two limits to which the decisions on this point tend.

1. *That any opinion formed or expressed, no matter how derived, will disqualify a juror.*

2. *That the opinion, however derived, must be fixed, and decided, and incapable of being affected by further evidence.*

Of the second point, no rational mind can have any doubt; and the decisions *all* agree there. Hence there is no question that an opinion of *this* nature will render a person incompetent to act as a juror. Between these two points, there is a great deal of indefinite ground. However, an examination of the cases, will give us about three positions, namely:—

1. Where any opinion is formed. 2. Where the source or foundation of the opinion is most considered; and, 3. Where the opinion, no matter how formed, can be removed by evidence, and is not sufficient to bias the mind.

§ 183. A previous opinion, no matter how formed, has been held sufficient as a cause of challenge in some places. This is the strictest test the courts have applied, but an examination will show that it has been principally allowed as a cause of challenge in capital cases, where stricter rules of competency are always applied. Thus, where the testimony of a juror on the challenge was that he had formed and expressed an opinion, but that he had no fixed opinion, none which could not be removed by the evidence, it was held that he was disqualified.¹

¹ *Cancemi v. People*, 16 N. Y. 501; *Trimble v. State*, 2 Greene (Iowa), 404; *Cotton v. State*, 31 Miss. 504; *People v. Williams*, 6 Cal. 206; *Brakefield v. State*, 1 Sneed, 215. But in Tennessee, if the opinion was formed from rumor only, it

Where a juror has formed and expressed an opinion as to the guilt or innocence of a prisoner, it is a good cause of challenge to the favor; and if not discovered until after the verdict, is good ground for a new trial.¹ In some places it is necessary that a juror shall have expressed an opinion besides merely forming one.² But in a subsequent case it was held that neither the formation or expression of an opinion will disqualify a juror, unless it be settled and abiding.³

A jocular remark made by a juror drawn on a murder case before the trial, that "the defendant ought to have been hung twenty years ago," without reference to the particular case, is not necessarily a ground of disqualification.⁴ A juror who has talked with a witness, and who believed what he heard

does not disqualify. *Major v. State*, 4 Sneed, 597; *Fouts v. State*, 7 Ohio N. S. 471; *People v. Gehr*, 8 Cal. 359; *Alfred v. State*, 37 Miss. 296; *State v. Gillick*, 7 Clarke (Iowa), 287; *Gray v. People*, 26 Ill. 344; *U. S. v. Wilson*, 1 Bald. 78; *State v. Godfrey*, Brayt. 170. In an action against a sheriff for trespass where the defendant justified under a distress warrant for rent in arrear, it was held that a person who had formed and expressed an opinion that there was no right or title to the rent for which the distress was made, was incompetent to serve as a juror. *Lord v. Brown*, 5 Denio, 345; *Blake v. Millsbaugh*, 1 Johns. 316; *State v. Jewell*, 33 Maine, 583; *People v. Bodine*, 1 Denio, 281.

¹ *Ray v. State*, 15 Geo. 223. This was cause for challenge for favor in *Schoeffler v. State*, 3 Wis. 823; *People v. Stout*, 4 Park. Cr. 71.

² *Baker v. State*, 15 Geo. 498; *People v. Cottle*, 6 Cal. 227; *State v. Morea*, 2 Ala. 275; *Hudgins v. State*, 2 Kelly, 173. I cannot see why a distinction has been made between the forming of an opinion and the expression of that opinion. Is not a person equally incompetent if he has formed an opinion, as he is after he has expressed that opinion. Surely an opinion formed and settled, though unexpressed, ought to be even more fit to exclude one than when that opinion may be hastily thrown out in an unguarded conversation. Nevertheless, good authorities for a long time—more formerly than at present—have sanctioned questions inquiring if the juror had formed *and expressed* an opinion, as in *Burr's trial*, "Have you ever formed and expressed an opinion about the guilt of Colonel Burr?" (1 *Burr's Trial*, 367), and, "Have you formed and delivered an opinion on the subject-matter of this indictment?" *Chase, J.*, in *U. S. v. Callender*, *Callender's Trial*, 19-21. But others discard this, and the question is, "Have you at any time formed or expressed, or even entertained an impression, which may influence your conduct as a juror?" *Ogden, J.*, in *People v. Johnston*, 2 Wheel. C. C. 367. "Have you expressed or formed any opinion relative to the matter now to be tried?" *U. S. v. Hanway*, 2 Wallace Jr. 129. In *People v. Rathbun*, 21 Wend. 509, the mere formation of an opinion was a ground of challenge to the favor only.

³ *Wright v. State*, 18 Geo. 383.

⁴ *Monroe v. State*, 23 Texas, 210. But where one said, "from what he knew, he would stretch the prisoner," it was a good cause of challenge. *Monroe v. State*, 5 Geo. 85.

from the witness, and formed an opinion so far as heard from him, but formed no opinion as to the prisoner's guilt or innocence, is competent.¹ So a juror who has heard much concerning a case is competent, provided he has formed no opinion.²

§ 184. *An Hypothetical Opinion.* — Many of these hold that a hypothetical opinion does not disqualify; that is, an opinion formed on a supposed state of facts, which may or may not be true.³ Thus, it was held in *Mann v. Glover*,⁴ that a mere hypothetical opinion is no legal ground of challenge to a juror. And where a juror summoned before a justice said, "if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff was right;" it was held that this was not sufficient as a cause of challenge.⁵

And impressions not amounting to opinions, formed from rumor, or from newspaper statements, are not sufficient to disqualify.⁶ So, when a person called as juror testified that he had read the newspaper statements of the occurrence, and that they had left no particular impression upon his mind as to the guilt or innocence of the prisoner, but that he believed, as a newspaper statement, that a homicide had been committed, and by the person named, he was held not disqualified to sit in the case.⁷

§ 185. *Opinions with regard to their Source or Foundation.* — Many of the decisions make a distinction between those opinions which are founded on mere rumor and such as are based on the report of witnesses or others professing to know the facts and circumstances. It is deemed that an opinion formed on rumor or newspaper reports cannot be expected to be deep or trustworthy, as the common impres-

¹ *Thomson v. People*, 24 Ill. 60.

² *State v. Howard*, 17 N. H. 171; *Commonwealth v. Thrasher*, 11 Gray, 57; *State v. Benton*, 2 Dev. & Bat. 196.

³ *State v. Ellington*, 7 Ired. 544.

⁴ 2 Green, 195; *Payne v. State*, 3 Humph. 375; *Baxter v. People*, 3 Gilman, 368; *Lee v. State*, 45 Miss. 114; *State v. Spencer*, 1 N. J. 196.

⁵ *Durell v. Mosher*, 8 Johns. 445. See *Freeman v. People*, 4 Denio, 9.

⁶ *State v. Crawford*, 11 Kan. 32; *State v. Ward*, 14 La. An. 673.

⁷ *People v. Hayes*, 1 Edm. (N. Y.) Sel. Cas. 582.

sion is that such reports or rumor may be unreliable, and that a person cannot safely make up his mind thereon; but an opinion formed from the relation of a witness who professes to know the facts, or any other person who may be able to speak with any certainty of the matter, is deemed more serious and objectionable.

Some few decisions follow the rule Hawkins laid down, that an opinion expressed through any malice or ill-will against a party is sufficient to disqualify. This rule obtained in New Jersey.¹ It was there held that a juror is not disqualified from serving in a capital case merely by having formed and expressed an opinion on the prisoner's guilt; to disqualify a juror in such a case, the declaration of opinion must have been such as to imply malice or ill-will against the prisoner.²

But this rule has not been adopted to any extent; for malice or ill-will alone ought to be sufficient to exclude the juror on the ground of a settled bias or prejudice. The test that has been more generally applied, is the *source* from which the opinions are derived, and not so much the *animus* with which they are expressed.³ So it was held that a previous opinion, formed on rumor, does not disqualify a juror, but one formed from the relation of a witness, either directly or through another person, does render a juror incompetent;⁴ but in subsequent cases in the same State, it was held that if the opinion, formed from rumor, required evidence to remove it, the juror was incompetent.⁵ If the juror had formed an opinion as to the prisoner's guilt from the reports of newspapers, of which he has not been able entirely to divest himself, though he says it would not affect his mind in determining the case on

¹ State v. Spencer, 1 N. J. 196.

² State v. Fox, 1 Dutch. 566. See Rice v. State, 7 Ind. 332.

³ Moses v. State, 11 Humph. 232; Ex parte Vermilyea, 7 Cow. 108; Rogers v. Rogers, 14 Wend. 131; Anderson v. State, 14 Geo. 709; Griffin v. State, 15 Geo. 477; Alfred v. State, 2 Swan (Tenn.), 581; Goodwin v. Blachley, 4 Ind. 438; People v. Stonecifer, 6 Cal. 405; Thompson v. State, 24 Geo. 297; State v. Bunger, 14 La. An. 461; State v. Rose, 32 Miss. 346; Quesenberry v. State, 3 Stew. & Port. 308; Van Vacter v. McKillip, 7 Blackf. 578; Irvine v. Lumbermen's Bank, 2 Watts & S. 190; State v. Anderson, 5 Harring. 493; Meyer v. State, 19 Ark. 156; Bradford v. State, 15 Ind. 347; Westmoreland v. State, 45 Geo. 225.

⁴ Nelms v. State, 13 Sm. & M. 500.

⁵ Alfred v. State, 37 Miss. 296; Ogle v. State, 33 Miss. 383. See Lee v. State, 45 Ibid. 114.

the evidence, the prisoner is entitled to the benefit of the doubt in a capital case.¹

In Kansas, by statute it is "a good cause of challenge to a juror that he has formed and expressed an opinion on the issue or any material fact to be tried;" but in a recent case it was decided that "impressions not amounting to opinions received from newspaper articles or rumor do not disqualify a juror, and are not cause for challenge."²

§ 186. The Character of the Opinion most considered. — Modern adjudications pay more attention to the nature or character of the opinion, without much or any reference to its derivation. No doubt the character of the age in which we live has, to a great extent, compelled courts to take this position. The time is long past when a person could be supposed to come into a court without any knowledge or information of a case upon which he is called to sit as a juror. The publicity now given to all occurrences — even ordinary cases — either by public rumor or the reports of the press, is such that the most indifferent and uninformed person must know or hear something of a case; and this knowledge or information must necessarily impress him more or less; and therefore courts have recognized this, and the former tests of competency are being more disregarded; and the simple inquiry is made as to the *nature* or *strength* of any opinion one may have formed, without regard to its origin. In a late case in Pennsylvania, the principle on which the competency of a juror in this respect should be determined, is well stated by Agnew, J., where he says: "But where the opinions or impressions of the juror are founded on rumor and reports, or even newspaper statements, *which the juror feels conscious he can dismiss*; where he has no fixed belief or prejudice, and is able to say he can fairly try the prisoner on the evidence, freed from the influence of such opinions or impressions, he ought not to be excluded. If exclusion should follow from such unsettled convictions, it would often be difficult to obtain a jury."³

¹ People v. Mallon, 3 Lans. 224.

² State v. Medicott, 9 Kan. 257.

³ Staup v. Commonwealth, 74 Penn. St. 458, and also in O'Mara v. Common-

§ 187. The opinion must be fixed and unaffected by the evidence, therefore, to render a juror incompetent. The following may be taken as an illustration of the cases that hold this standard of competency. Where, on the impanelling of a jury for a trial for murder, a juror states that he has formed and expressed a decided opinion as to the prisoner's guilt, based upon the information that he has received, but that he is not prejudiced, and is capable of forming a fair opinion upon the evidence that may be offered, he is competent to serve as a juror upon the trial.¹ And the same principle was observed in a late case in the same State. Thus, a person called as a juror in a trial for murder says, in answer to a question, "I have expressed an opinion from what I have heard. What I have heard was not from any witness. My opinion was not a fixed one. I think I can give the prisoner a fair trial without reference to the opinion I have expressed." He was accepted as a competent juror.²

And it is said in *Boon v. State*,³ that the opinion which disqualifies depends upon the nature and strength of the opinion, and not its source or origin.

And it was lately held in Missouri, that the mere fact that a juror has formed an opinion does not of itself render him incompetent; to have that effect the opinion must be such as might influence his judgment.⁴

In Iowa, in the case of *State v. Lawrence*,⁵ decided in December, 1873, the juror when questioned answered, "I believed the man had been murdered, and defendant did it. It would take some evidence or explanation to remove the opinion from

wealth, 77 Penn. St. 424. In *State v. Collins*, 70 N. C. 241, it is said: "If we disqualify all who have received some impression from such information or rumors, and have casually expressed an opinion as to the guilt or innocence of the accused, we will exclude from the jury box the best educated and the most liberal minded portion of the community. The better informed a juror is, the more apt will he be to guard against improper influences."

¹ *Epes' case*, 5 Gratt. 576.

² *Little v. Commonwealth*, 25 Gratt. 921; *Jackson v. Commonwealth*, 23 Gratt. 919; *Smith v. Commonwealth*, 7 Ibid. 593; *Commonwealth v. Webster*, 5 Cush. 295; *Sanchez v. People*, 4 Park. Cr. 535; *Monroe v. State*, 23 Texas, 210; *State v. Williams*, 3 Stew. (Ala.) 454; *State v. Thompson*, 9 Iowa, 188; *People v. King*, 27 Cal. 507; *State v. Potter*, 18 Conn. 166.

³ 1 Kelly, 631.

⁴ *McComus v. Cov. Mut. Ins. Co.* 56 Mo. 573.

⁵ 38 Iowa, 51.

my mind. I have no bias upon my mind for or against the defendant. I know nothing about the case, except what I have heard from rumor and newspaper prints. . . . I believe I can sit and decide the case with the same impartiality as if I had never heard of the case ;” and it was held, on appeal, this juror was competent. And in the same State, in the case of *State v. Bryant*, decided on appeal in April, 1875, where one of the jurors, on being challenged for having formed an opinion in the case, testified that “he had formed an opinion in regard to some of the transactions from what he had heard and read of the case which would require some proof to remove ; that he had no bias or prejudice in favor of or against the defendant, and that he could render an impartial verdict upon the evidence.” The court below overruled the challenge, and the ruling was affirmed.¹

These are sufficient to show the tendency of modern decisions on this great question of competency ; and the same principle has lately been incorporated into many of the statutes in our States.²

¹ See *Western Jurist*, Dec. 1875, p. 709.

² The futility and absurdity of the old test of competency were signally illustrated in the trial of persons engaged in the “Anti-rent” agitation in New York. The feeling in regard to this agitation ran high, and the matter became of great notoriety. For two weeks the court sat ten to twelve hours a day endeavoring to obtain a jury ; but under the test then applied, that an opinion or impression, no matter how formed, disqualified, which was laid down in *People v. Bodine*, 1 Denio, 281, 4,000 jurors were challenged and examined out of about 6,000 summoned, and only ten ! were found who were not excluded by the test as applied. Further effort to obtain a jury was then abandoned, and the *venue* was changed to Orange County. *Albany L. J.* vol. 5, p. 81. The rule the courts have settled upon, as well as that embodied in statutes lately, will have a good effect upon the character of the jury, and will serve to remove the common reproach too long attached to the process of impanelling a jury, that none but ignorant, uninformed men were competent to sit on a jury. However, there is a limit to this legislation ; for there are some essential constituents of the jury which cannot be meddled with. Impartiality is one, and any law impairing this would certainly take from the jury one of its best and fundamental elements. Hence, no law can be passed denying the right of challenge for cause ; for this is taking away a right that has always accompanied jury trial from its earliest introduction. A remarkable instance of this was a recent law of the State of Nevada which the court has lately (March, 1876) declared unconstitutional. By a law of March 2, 1875, challenges for actual or implied bias were not given, though twelve peremptory challenges were allowed the prisoner and State. In the case of *McClellan v. State*, the Supreme Court have decided this act to be unconstitutional. The decision is a very full and able one, and reflects credit on the judiciary of one of our youngest States.

§ 188. **Statutory Provisions.** — The statute recently enacted in New York¹ reads: "The previous formation or expression of an opinion or impression in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action; provided the person proposed as a juror who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath, that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror." In *Stokes v. People*,² the constitutionality of this act was called in question, but the court decided it to be constitutional.

And in Illinois the statute provides: "that in the trial of any criminal cause, the fact that a person called as a juror, has formed an opinion or impression, based upon rumor or newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."³

The California statute has substantially the same provision. By the amendment to section 1076 of the Penal Code, it is provided: "No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him."

¹ Laws 1872, c. 475.

² 53 N. Y. 164. But this act does not qualify jurors who have previously sat in a case embodying the same cause of action. *Barclay v. People*, 8 Alb. L. Journal, 104.

³ Rev. Stat. (1874) p. 633.

§ 189. Service on a previous jury where the same facts or matters were under consideration, is allowed to be a decided disqualification to a juror. For the law holds that opinions formed in this manner are not so evanescent, or so much under control, as those formed from other sources. Hence, a grand juror who found the indictment was early disqualified as a juror on the trial of that indictment under the statute 25 Edw. III., which only affirmed a principle of the common law.¹ But the mere fact that a person's name is on the grand jury list is not sufficient to exclude him from the petit jury.²

Hawkins says: "This exception against a juror, that he hath found an indictment against the party for the same cause hath been adjudged good, not only upon the trial of such indictment, but also upon the trial of another indictment or action wherein the same matter was either in question or happens to be material though not directly in issue."³ Thus, where a person who had been one of the grand jury in the finding of another indictment against the prisoner, but not that on trial, and was tendered as a petit juror, he was held incompetent, the court remarking, "he cannot be impartial."⁴

Where the issues and evidence in a case are the same as in a previous case against the same defendant, before the same jury, the law presumes the jury to be under a disqualifying bias, from their previous verdict.⁵ And an opinion, formed on evidence given at the trial of another party for the same murder, such as without counteracting testimony the juror says would be conclusive against the prisoner, is a good cause for a challenge.⁶ And it is good cause for challenging a juror who has already been chosen, but not sworn, that he grossly misbehaved himself as a juror on a former occasion, declaring that he had tried to acquit every one whom the judge desired to convict, and would as lief swear on a spelling-book as on a Bible, because he was a Tom Paine man.⁷

¹ *Rex v. Percival*, 1 Sid. 243; *Rice v. State*, 16 Ind. 298; *Stewart v. State*, 15 Ohio N. S. 155; *McGehee v. Shafer*, 9 Tex. 20; *Rogers v. Lamb*, 3 Blackf. 155.

² *Rafe v. State*, 20 Geo. 60.

³ 2 Hawk. P. C. c. 43, § 27.

⁴ *Oates' case*, 10 How. St. Tr. 1079, 1081.

⁵ *Garthwaite v. Tatum*, 21 Ark. 36; *State v. Webster*, 13 N. H. 491; *Spear v. Spencer*, 1 Iowa, 534; *Smith v. Wagpenseller*, 21 Penn. St. 491.

⁶ *State v. Anderson*, 5 Harr. 493.

⁷ *McFadden v. Commonwealth*, 23 Penn. St. 12.

The question has arisen as to the competency of a person on a coroner's jury to serve as a juror on the trial of an indictment for the murder of a party on whose body the inquest was held; but in a case where a person who had presided as coroner testified that he had neither expressed nor formed any opinion as to the guilt or innocence of the prisoner, he was accepted.¹

§ 190. Previous Service may not disqualify, when.—Hawkins says: "But it hath been adjudged to be no good cause of challenge, that the juror hath found others guilty on the same indictment; for the indictment is, in judgment of law, several against each defendant, for every one must be convicted by particular evidence against himself."²

And where the two cases are similar against the same defendant, yet involving different facts to be proved by different evidence, a juror who has served in the one case is competent also to serve in the other.³ So, in California, a jury tried a suit for burning a fence by sparks from the defendant's steamer; in another trip of the same steamer, another fence was burned. The defendant in the latter case objected to a juror, as having been on the jury in the former suit; but it was held that the court could not know, until the evidence was heard, that the proof or the facts were the same or similar in the two cases; that even if the court knew that they were the same, the same jury could hear both cases.⁴

A few cases hold that where a juror has served on a former trial where there was a disagreement, or a verdict directed by the court, he is not thereby necessarily incompetent in a second trial of the case.⁵

But this is contrary to the current of authorities, and these cases would hardly be followed elsewhere.

¹ O'Connor v. State, 9 Fla. 215. In the California Code he is declared incompetent. Penal Code, § 1074.

² 2 Hawk. P. C. c. 43, § 29. See State v. Sheeley, 15 Iowa, 404.

³ Commonwealth v. Hill, 4 Allen, 591.

⁴ Algier v. Maria, 14 Cal. 167.

⁵ Whitner v. Hamlin, 12 Fla. 18; Atkinson v. Allen, 12 Vt. 619. A challenge *propter delictum*, though not very common, should be noticed. It is allowed for some criminal act of the juror when he has ceased to be, in consideration of law, *probus et legalis*. Thus, that he has been convicted of treason, felony, perjury, conspiracy, forgery, &c., or other infamous crime. Co. Litt. 158.

§ 191. **Challenges to the Favor.** — Little need be said on this head, as these challenges are so indefinite, and are now little observed in actual practice. The classification of challenges for cause formerly adopted was a very unphilosophical one; the dividing line being sometimes indeterminable. If there was any definite rule, it was that whenever a challenge for principal cause had failed, a resort was then had to the challenge for favor, when it was submitted to triors,¹ who, of course, could have no certain rule of determination, but decided according as the matter affected or impressed their own minds. It is obvious, therefore, that no exact rules could be settled for deciding on the competency of a juror in this manner. Hence, under this system, the greatest uncertainty must prevail, and it would be impossible to reduce the system of challenges to any principle or regularity. Therefore this mode is not favored; it is in many places abolished; and the arbitrary distinction must also become obsolete. In the modern codes it is not regarded; and it is not too much to say that in a short time we shall only read of it as a fanciful distinction of the common law.

Still, it is observed, even where the mode of determination by triors has been abolished; but it cannot exist there long. As an evidence, in the late trial of *Tilton v. Beecher*, though the distinction nominally existed in New York, it was practically disregarded, as the court now determines all challenges under the law of 1873.

“Challenges to the polls for favor are when, though the juror is not so evidently partial as to amount to a principal challenge, yet there are reasonable grounds to suspect that he will act under some undue influence or prejudice.”² As these challenges exist in some of our States, and the mode of deciding them by triors is also in existence, we shall, therefore, consider how these are appointed, and how they act.

¹ Where a challenge for principal cause is overruled by the court, and the juror is then challenged for favor, it is erroneous to instruct the triors that the latter challenge is in the nature of an appeal from the judgment of the court upon the facts. *Freeman v. People*, 4 Denio, 9.

² 1 Chitty C. L. 544. “The causes for challenge for favor are very various, and not subject to precise definition. The question is to be submitted as a question of fact upon all the evidence to the conscience and discretion of the triors, whether the juror is indifferent or not.” *People v. Bodine*, 1 Denio, 281.

§ 192. *Triors* — how appointed. — These were appointed in the common law as follows: If the challenge were made to the first juror, the court directed two indifferent persons to try the question, and if they found the person challenged indifferent, he was sworn, and then joined with the triors in determining the next challenge: and when two jurors had been found impartial, and had been sworn, they took the place of triors for every subsequent challenge to favor.¹

The oath administered is: "You shall well and truly try whether A. B. (the juror challenged) stand indifferent between the parties to this issue, so help you God."²

Where the triors of a challenge for favor are sworn to find whether the juror is indifferent "upon the issue joined," the oath is erroneous: they should be sworn to find whether the juror is indifferent as to the issue, and impartial between the parties.³

Any two jurors may serve as triors;⁴ and therefore on a trial for murder a juror was challenged for favor. The first two jurors sworn, having been appointed triors, sworn as such, and having heard the evidence, arguments, and charge, could not agree; and it was held that the next two, the third and fourth, should be selected to rehear the matter as triors, and they were so sworn.⁵

A challenge to the favor tried by three jurors, vitiates the judgment.⁶

§ 193. *How they act.* — If the triors do not find the juror impartial, it is their duty to reject him; and whenever in criminal cases the examination of the evidence given upon a challenge leaves a reasonable doubt of the impartiality of a juror, the defendant should have the benefit of the doubt, and the juror be excluded.⁷ They must find that the juror chal-

¹ Co. Litt. 158 a; Bac. Ab. Juries (E. 12); 3 Bl. Com. 353.

² 1 Salk. 152; *Copenhagen v. State*, 14 Geo. 22.

³ *Freeman v. People*, 4 Denio, 9. See *Griffin v. State*, 15 Geo. 476.

⁴ *McGuffie v. State*, 17 Geo. 497. Now in Georgia under the act of 1856, the presiding judge in criminal cases is trior of the competency of jurors. *Jordan v. State*, 22 Geo. 545. The decisions of those States where the system is abandoned will, of course, be applicable to those where it is still preserved.

⁵ *People v. Dewick*, 2 Park. Cr. 230.

⁶ *McCormick v. Brookfield*, 1 South. 69.

⁷ *Smith v. Floyd*, 18 Barb. 522; *Holt v. People*, 13 Mich. 324

lenged is *then* indifferent; it is not enough that he was so before he came into court.¹

When a juror has been put upon triors, and they have retired to make up their verdict, it is not proper to move the court to send written instructions to the triors to propound a particular interrogatory to the juror. The triors should be brought into open court, and instructed publicly and in presence of both parties respecting the whole matter.² The trial, in fact, should be conducted, as in the trial of any issue, before a full jury; the court should not instruct them how they are to find.³

The opinion which a juror may have formed in reference to the character of the prisoner, is not sufficient to justify the triors in setting aside the accused.⁴

To ascertain the bias, the exact state of the prisoner's feelings, his disposition of mind in reference to the issue or the parties, the triors can resort to all available evidence tending to prove the partiality or unfitness of the juror. Hence, it was held that for this purpose it is proper to examine the wife and children as well as the neighbors and journeymen of the person on trial.⁵

If a party who challenges to the favor fails to ask for triors, but produces evidence to the court, it is a waiver of the examination by triors,⁶ and in this case the decision of the court is conclusive as to the competency of the juror.⁷

§ 194. Challenges, when taken. — The time when a challenge should be taken to a juror for cause, is when the juror

¹ Thompson v. People, 3 Park. Cr. 467.

² Whaley v. State, 11 Geo. 123.

³ Baker v. State, 15 Geo. 498; People v. McMahon, 2 Park. Cr. 663; Epps v. State, 19 Geo. 102.

⁴ People v. Lohman, 2 Barb. 216. When a juror is challenged to the favor he may be interrogated in order to show the state of his mind, and may be asked whether he has read reports or listened to stories of the matters forming the subject of the issue. Schoeffler v. State, 3 Wis. 823.

⁵ People v. Boughton, 1 Edm. (N. Y.) Sel. Cas. 140.

⁶ People v. Mather, 4 Wend. 229; O'Connor v. State, 9 Fla. 215; O'Brien v. People, 36 N. Y. 276; Commonwealth v. Gross, 1 Ashmead, 281.

⁷ Costigan v. Cuyler, 21 N. Y. 134; Sanchez v. People, 22 N. Y. 147. While this was decided under the former law in New York, it should be observed that the recent law allows an appeal from the decision of the court. Laws 1873, c. 427.

is presented to a party, and before he is sworn; if he fails to object then, when an opportunity is presented, he is held to accept him, and cannot thereafter, as a rule, object to his competency.¹ Hence, where the court permitted the prosecuting officer to make such challenge, after the jury were sworn, and the prisoner put upon his deliverance, and they were set aside against the consent of the prisoner, and other jurymen substituted in their places, who convicted the prisoner, it was held that the prisoner should be discharged.²

So, a prisoner has no right to postpone showing cause of challenge to a juror, and to have him stand aside until the panel is finished; this is a privilege only conceded to the State when no peremptory challenges were allowed the State.³

Nevertheless, a challenge may be allowed, in the discretion of the court, to a juror, after a juror has been sworn and accepted. It is evident that a court must be invested with this discretion to further the interests of justice; for there may often be cases where some serious objection to a juror could not be known until after he was impanelled, or there may be some objection arising from the conduct of the juror subsequent to his being accepted, that should exclude him on the motion of either party.⁴ Accordingly, we find such discretion exercised by the court, without objection.⁵ Thus, it has been held that, though neither party has a right of challenge after a juror is sworn, it is in the discretion of the court to protect the administration of justice, by investigating, at any stage of the trial, an objection to the impartiality of a juror, and by withdrawing the case from the jury, if any juror is found unfit to sit thereon.⁶

¹ *State v. Patrick*, 3 Jones L. (N. C.) 443; *Ripley v. Coolidge*, Minor, 11; *Glover v. Woolsey*, Dudley (Geo.), 85; *State v. Morea*, 2 Ala. 275; *State v. Bunger*, 14 La. An. 461; *McFadden v. Commonwealth*, 23 Penn. St. 12.

² *Ward v. State*, 1 Humph. 253.

³ *State v. Bone*, 7 Jones L. (N. C.) 121.

⁴ The provisions of the Rev. Code, Georgia, § 4588, providing the mode of proceeding, if a juror is, by newly discovered evidence, found to be incompetent, after the jury is made up and before the trial, apply as well where the State objects as to an objection by the prisoner. *Eberhart v. State*, 47 Geo. 598.

⁵ *Tooele v. Commonwealth*, 11 Leigh, 714; *Haynes v. Crutchfield*, 7 Ala. 189; *People v. Bodine*, 1 Edm. (N. Y.) Sel. Cas. 36; *Funkhouser v. Pogue*, 8 Eng. (Ark.) 295.

⁶ *United States v. Morris*, 1 Curtis C. C. 23. See *Dilworth v. Commonwealth*, 12 Gratt. 689.

In criminal cases it is the right of the prisoner to make his challenges first,¹ but in civil cases it is immaterial which party challenges first.²

In Iowa, in the formation of the jury, the parties to the suit must alternate in their challenges, the plaintiff beginning.³

All causes for principal challenge relied on by one party, must be taken together at one time, and all causes for challenge to the favor relied on by one party, must be taken together and tried at one time, excepting fresh causes arising after trial of those first assigned.⁴

§ 195. Questions to Jurors in challenging. — Having pointed out the various grounds of challenge, their degree, and mode of trial, we are next led to an important and practical inquiry as to the means of discovering the facts which will justify the exclusion of a juror. The success of a challenge depends, of course, upon eliciting such information from the juror himself, or from other sources, as to his state or condition of mind, as will enable a judgment to be formed as to his competency. For this purpose, the law subjects the juror to an examination on oath, when questions are put to test his competency.⁵ But there is a limit placed on this examination; the juror is not compelled to answer all and every question proposed; there are some questions the law will not compel *him* to answer, just as a witness in a cause has the privilege to refuse answering certain questions. Hence, it becomes necessary to ascertain what questions a juror may not be compelled to answer, and also, to determine the policy the law has in view, when it prohibits such questions.

§ 196. Questions tending to the disgrace of the juror, are not to be asked. This was an invariable rule of the com-

¹ *Rex v. Brandreth*, 32 How. St. Tr. 774; *Jones v. State*, 1 Blackf. 317.

² *Trial per Pais*, 144. See note, 1 Cow. 439.

³ *Davenport & Co. v. Davenport*, 13 Iowa, 229.

⁴ *Carnal v. People*, 1 Park. Cr. 272; *Mann v. Glover*, 2 Green, 195.

⁵ In some States the questions to be propounded to jurors are prescribed in the statute; and in Georgia it is held to be improper to put any other. *Williams v. State*, 3 Kelly, 453. But in New Hampshire the court can propound others. *Pierce v. State*, 13 N. H. 536.

mon law, not only in this, but in every examination. A person ought not, it was held, to be asked any questions tending to his infamy or disgrace.¹

In New Jersey, since the act of 1855, a juror himself may be examined on the question of his disqualification by reason of malice or ill-will against the prisoner, that statute having altered the common law rule that a juror shall not be examined as to any disqualification tending to his own disgrace.²

Nor can a juror be asked specifically whether he believes the prisoner guilty, or whether he believes him innocent. Because the examination in this manner would have a tendency to create an impression either for or against the prisoner on the others.³ So, on the examination of a juror on his *voir dire*, the question was asked him, "In case the defendant is found guilty of murder, have you made up your mind as to what degree of punishment ought to be inflicted upon him;" it was held the question was an improper one.⁴

During the impanelling of a jury in a civil case, the defendant's counsel asked several jurors, "If upon hearing the testimony they should find it evenly balanced, which way they would be inclined to decide the case." This was objected to, and sustained; and it was held on appeal that the question was proper as determining the exercise of defendant's right to a peremptory challenge.⁵ But it is improper to ask jurors if they have formed an opinion on a particular line of defence which may be set up, as for instance insanity.⁶

§ 197. Questions as to Religious or other Preferences.

— The question frequently arises as to the right to interrogate a juror regarding his opinion as to a certain body of men, religious or secular, or as to his sympathy with, or antipathy to certain beliefs, doctrines, or practices which may affect the question at issue.

¹ 3 Bl. Com. 314; *Farmers' Bank v. Smith*, 19 Johns. 115; *Hudson v. State*, 1 Blackf. 317.

² *State v. Fox*, 1 Dutch. 566.

³ *Bac. Abr. Juries* (E. 12); *State v. Sims*, 2 Bailey, 29; *State v. Crank*, *Ibid.* 66; *State v. Bennett*, 14 La. An. 651; *State v. Baldwin*, Const. R. (S. Car.) 289.

⁴ *State v. Ward*, 14 La. An. 673.

⁵ *Chicago, &c. R. R. Co. v. Buttolf*, 66 Ill. 347.

⁶ *State v. Arnold*, 12 Iowa, 479.

In the case of *People v. Christie*,¹ which was an indictment for riot arising out of prejudices between Roman Catholics and others, defendants were members of a society of Hibernians and Catholics. It was held proper to ask a juror, "Have you any bias or prejudice against Roman Catholics?" and that it was error to allow him to refuse to answer, upon the ground that his answer would tend to disgrace him. And the court says, on appeal,² "The right to an impartial jury is not to be sacrificed to the fear or apprehension of wounding the feelings of others. . . . There is neither dishonor nor disgrace attached to the fact that a man had formed an opinion upon any subject which agitated public consideration."

And on the trial of *Tilton v. Beecher*, nearly every juror when questioned was asked as to his church associations and preferences. Thus, "Do you belong to any religious denomination?" "I belong to Dr. Cuyler's Church."³ In the trial of Macfarland for murder in New York,⁴ it was assigned as ground of challenge to the favor that the juror sympathized with certain practices and doctrines which had some bearing on the question. Jurors were accordingly questioned as to their opinion of a certain marriage at the Astor House, and as to their acquaintance with the officiating minister.

This question came directly before the court in a case in California, and the same ruling was made as in New York. A juror being challenged for bias, was asked, "Are you a member of a secret and mysterious order known as, and called, Know Nothings, which has imposed on you an oath, besides which an oath administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded? Are you a member of any secret association, political or otherwise, by your oaths or obligations to which any prejudice exists in your mind against Catholic foreigners," and other questions of like import. These questions were disallowed; but on appeal, it was decided this was error.⁵ But while the reasons given in *People v. Christie* may be accepted as sound, there must be some limitation to this mode of questioning in

¹ 2 Park. Cr. 579.

² 2 Abb. Pr. 256.

³ 1 Abb. Rep. 141.

⁴ 8 Abb. Pr. N. S. 57.

⁵ *People v. Reyes*, 5 Cal. 347.

violation of a rule well observed in the common law, that a witness is not compelled to answer to his own disgrace. Thus, when certain persons were on trial for burning a Roman Catholic convent, the question was sought to be asked of a juror if he would believe a person on oath professing that faith, and the court decided the question could not be put, remarking: "We think it is entirely objectionable. You might as well argue upon the effect of any other particular doctrine, for instance, if the witness belongs to a sect which holds that the extent or duration of future punishment will be less than it will be according to the tenets of a different sect, you might argue that his testimony is not entitled to so much confidence as it would be if he belonged to the latter sect."¹

§ 198. *Waiver of Challenge.* — As a matter of course, a person is permitted to waive his cause of challenge if he wishes. It was said in a case that if the parties choose to have their cause tried by a prejudiced juror, it is not for the court to refuse them that right.² But this seldom happens by any willful deliberate act of a party. However, without any express waiver of a challenge, there may be certain acts of a party from which the law will imply a waiver of his challenge to the jury. Thus, a party who refuses to challenge any jurors, giving as a reason that if he does the panel will be filled from bystanders, all the drawn jurors except twelve having been discharged by the court, thereby waives his right to challenge, and cannot afterwards object on writ of error to the jury.³

As a rule, the omission to challenge a juror before trial is a waiver of any objection to him; and it is too late after verdict to move for a new trial on the ground of his disqualification.⁴

Where a jury is called to try an issue, and the list of jurors is handed to the counsel for the plaintiff, who declines strik-

¹ *Commonwealth v. Buzzell*, 16 Pick. 153.

² *Van Blaricum v. People*, 16 Ill. 364.

³ *Miller v. Wilson*, 24 Penn. St. 114.

⁴ *Keener v. State*, 18 Geo. 194; *Norfleet v. State*, 4 Sneed, 340; *Fox v. Hazelton*, 10 Pick. 275; *Gillespie v. State*, 8 Yerg. 507; *Pittsfield v. Barnstead*, 40 N. H. 477; *Wallace v. Columbin*, 48 Maine, 436; *People v. Coffman*, 24 Cal. 230; *Daniel v. Gray*, 53 Ark. 50.

ing any names therefrom, and hands it over to the counsel for the defendant, who strikes off one of the persons named, the plaintiff's right to challenge is confined to the juror last called; and he cannot object to any of the jurors whose names were on the list at the time it was first handed to him.¹

PART V. SWEARING THE JURY.

§ 199. *Form of Oath.* — The weighty and responsible duties of jurors are impressed upon them by the force and solemnity of an oath, which is administered generally after the full number have been obtained by challenge and examination.² The form of the oath in criminal cases is thus given: "You shall well and truly try, and true deliverance make, between our sovereign lord the king and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God."³ The oath which is administered in our States conforms substantially to this form, *mutatis mutandis*, except in those States where the jury in criminal matters decide on the law and evidence.

Thus, in New York: "You shall well and truly try, and true deliverance make, between the people of the State of New York and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God."⁴ And in California: "You do swear that you will well and truly try this issue between the people of the State of California and A. B. the defendant, and a true verdict render according to the evidence."⁵

In civil cases, the oath is to well and truly try the issue between the parties, and a true verdict give according to the evidence.⁶ In Pennsylvania the oath in such cases is: "You and each of you do (swear or affirm) that you will well and truly try the issue between C. D., plaintiff, and E. F., defendant, and a true verdict give according to the evidence, unless

¹ Hotz v. Hotz, 2 Ashmead, 245.

² According to 4 Harg. St. Tr. 723, 724, each juror is sworn when called and not challenged.

³ 1 Hale P. C. 293; 4 Bl. Com. 355.

⁴ Edw. Juryman, p. 104.

⁵ Penal Code, § 1437.

⁶ 3 Bl. Com. 365.

dismissed by the court, or the cause be withdrawn by the parties. So help you God."¹

§ 200. **Form when Jury decide the Law and Fact.**—In Arkansas, where the jury are the judges of the law and evidence, they should be sworn to give their verdict according to both. Therefore, when in a criminal case the oath was administered according to the English form, it was decided to be error, and the judgment was reversed. The form there should be: "You shall well and truly try, and a true deliverance make, between the State of Arkansas and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the law and evidence. So help you God."²

In Ohio, where the record of a judgment in a criminal case showed that the jury were "impanelled and sworn the truth to speak upon the issue joined between the parties," it was held sufficient without the addition of the words, "according to the law and the evidence."³ The object of the oath in the form "according to the law and the evidence," is to preclude the jurors from considering any private knowledge they may possess outside of the evidence given in court.

In Connecticut, though the function of the jury is still confined to a finding of the facts, yet they are sworn as follows: "You solemnly swear by the name of the ever living God, and without respect of persons, or favor of any man, you will well and truly try, and true deliverance make, between the State of Connecticut and the prisoner at the bar, whom you shall have in charge, according to law and the evidence before you. So help you God."⁴ In Kansas the jury are sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and

¹ Purdon's Dig. p. 584.

² *Patterson v. State*, 2 Eng. 60; *Sandford v. State*, 6 Eng. 328; *Bivens v. State*, Ibid. 455. In Gantt's Dig. § 1921, the latest form is: "You and each of you do solemnly swear that you will well and truly try the case of the State of Arkansas against A. B., and a true verdict render, unless discharged by the court, or withdrawn by the parties."

³ *Boose v. State*, 10 Ohio N. S. 575. But in Ohio the jury are to take the law from the court. *Montgomery v. State*, 11 Ohio, 424.

⁴ Rev. Stat. (1875) p. 548.

the evidence.¹ And the oath in Michigan is to try "according to the evidence and the laws of the State."² The same is the form in Minnesota.³

§ 201. *Meaning of "Issue Joined."* — The word "issue" is often used as a *nomen collectivum*, and the phrase "issue joined" may embrace various distinct grounds of defence: and, therefore, where there were two distinct defences, on each of which issue was joined, it was not erroneous to find the verdict on the *issue* joined.⁴

In Iowa, when the record sets forth that the jury were "sworn the truth to speak upon the issue joined between the parties," it was decided to be erroneous, as the form prescribed by statute is: "You solemnly swear (or affirm) that without respect to person or favor, or fear, you will well and truly try, and true deliverance make, between the State of Iowa and the prisoner at the bar, whom you have in charge, according to the evidence given you in court, and the laws of this State. So help you God."⁵

Where a jury were sworn "well and truly to try the issue between the parties," it was sufficient in a civil case.⁶ And it is not necessary in an action of trover to swear the jury "to try the issue and the damages to assess;" it is sufficient if they are sworn to "try the issue joined."⁷ In a civil case, where the jury were "sworn well and truly to try and the truth to speak upon the issues joined," it was held proper.⁸

Where there are several cases submitted to one jury by agreement, they must be sworn separately for each case:⁹ and where the issues are altered after the jury were sworn, they must be re-sworn before hearing the case.¹⁰

¹ Gen. Stat. c. 80, § 274.

² Comp. Laws, § 7953.

³ Rev. Stat. (1866) c. 72, p. 516.

⁴ *Pointer v. Rust*, 7 Humph. 532. But where there are two or more counts in a declaration, to which there are pleas and issue, it is error to impanel and swear the jury to try the issue on one count only. *Adams v. State*, 6 Eng. 446.

⁵ *Harriman v. State*, 2 Greene, 270; *Warren v. State*, 1 Greene, 106; *Dixon v. State*, 4 Greene, 381.

⁶ *Pierce v. Tate*, 27 Miss. 283; *Windham v. Williams*, Ibid. 313.

⁷ *Vaden v. Ellis*, 18 Ark. 355.

⁸ *Burk v. Clark*, 8 Fla. 9.

⁹ *Kitter v. People*, 25 Ill. 42.

¹⁰ *Hoot v. Spade*, 20 Ind. 326.

Under the provisions of the statutes of Alabama, it is sufficient if they are sworn, in a criminal case, "well and truly to try the issue joined."¹

In suits on penal bonds where breaches have been assigned, swearing the jury to inquire into the truth of the breaches is equivalent to swearing them to try the issues, and not liable to objection.² A jury should not be sworn to try the issue, where there is none joined between the parties.³

§ 202. Greater Strictness required in Criminal Cases. — In criminal cases there is more strict compliance required with the form and substance of the oath, and there are not the same presumptions in favor of its due administration as in civil cases. As was said in *Harriman v. State*,⁴ in reference to an imperfect form administered in a civil case: "It is so deficient in substance, so barren of solemnity of essential declarations and restrictions, which should be required as the most imposing moral and legal restraint from those who are intrusted with the life and destiny of a fellow-being, that we can under no rule of practice affirm the judgment which resulted from their verdict."

So, in New Hampshire, where the Revised Statutes prescribe the form of oath to be administered to petit jurors in criminal cases, and where in a criminal case an oath in form for civil trials was administered, upon exception, the verdict was set aside, and a new trial granted; the court holding that the statute imperatively requires the form to be adhered to.⁵

In civil cases there is a presumption that the jury were sworn, but this is not so in criminal cases; there it must appear affirmatively from the record.⁶ But an entry in a crim-

¹ *McGuire v. State*, 37 Ala. 161.

² *McCoy v. State*, 22 Ark. 308.

³ *Miles v. Rose*, 1 Hemp. 37; *Baltimore, &c. R. R. Co. v. Christie*, 5 W. Va. 325.

⁴ 2 Greene, 285. The Minnesota statute provides one form of oath for jurors in capital cases, and another form for other cases; though the difference is but trivial, a failure to follow the statute vitiates the verdict in a capital case. *Maier v. State*, 3 Minn. 444.

⁵ *State v. Rollins*, 2 Foster, 528; *Sutton v. State*, 41 Tex. 513; *Bray v. State*, *Ibid.* 560.

⁶ *Clark v. Davis*, 7 Tex. 556; *Drake v. Branler*, 8 Tex. 351; *Dillingham v.*

inal case that the jury were "sworn the cause to try according to law," cannot be regarded as an attempt to spread the form of the oath upon the record; and as it states that the jury were "sworn," the court will presume that the proper oath was administered.¹ And in a criminal case the jury should not be sworn for the term but for the trial of each particular case.²

§ 203. When Objections should be made. — Whenever any error is made in the administration of the oath, it should be objected to in the court below; the objection cannot be made in the appellate court for the first time.³ So, where the record shows that the jury were sworn the truth to speak upon the issue joined, the court above will hold the oath sufficient, especially if not objected to below.⁴

It is no objection that the jurors in a capital case are not sworn one at a time;⁵ and there is no law requiring four jurors to be called at a time to be sworn; a less or a greater number may be called at any one time, and the parties be required to pass upon them.⁶

Skein, 1 Hemp. 181; Welborn v. Spears, 32 Miss. 138; Morris v. State, 38 Tex. 603.

¹ Russell v. State, 10 Tex. 288. See Edwards v. State, 49 Ala. 334; McCuller v. State, Ibid. 39.

² Barney v. People, 22 Ill. 160.

³ Looper v. Bell, 1 Head, 373; Candler v. Hammond, 23 Geo. 493.

⁴ Wrocklege v. State, 1 Clarke (Iowa), 167.

⁵ O'Connor v. State, 9 Fla. 215.

⁶ Walker v. Collier, 37 Ill. 362.

CHAPTER VI.

TRIAL OF THE ISSUE; AND HEREIN OF THE DUTY AND LICENSE OF COUNSEL.

- § 204. Scope of the Present Inquiry.
- § 205. Privilege to be represented by Counsel.
- § 206. Privilege given by Statute.

PART I. RIGHT TO OPEN.

- § 207. Advantage of the Right.
- § 208. Procedure in Criminal Cases.
- § 209. Duty of Counsel in Opening.
- § 210. Especially in Criminal Cases.
- § 211. Right to begin.
- § 212. Party holding the Affirmative opens.
- § 213. When the Record contains Several Issues.
- § 214. The Defendant begins : when.
- § 215. Plaintiff's whole Title must be admitted.
- § 216. Where a Party relies on a Negative Allegation.
- § 217. When the Knowledge is confined to the Other Party.
- § 218. Right where Wills are contested.
- § 219. Reasons for Difference in Opinion.
- § 220. The Party upholding Will should begin.
- § 221. Right to reply.
- § 222. Remedy if Right be refused.

PART II. EXAMINATION OF WITNESSES.

- § 223. Importance of Duty.
- § 224. Examination in Chief.
- § 225. Demeanor in respect to one's own Witnesses.
- § 226. Leading Questions not to be put.
- § 227. Leading Questions sometimes admissible.
- § 228. Must not ask for Opinion or Belief.
- § 229. A Witness may refer to Memoranda.
- § 230. Use of Memoranda on Lord Gordon's Trial.
- § 231. A Party cannot impeach his own Witness.
- § 232. Cross-examination.
- § 233. Opinion of Whately in respect to.
- § 234. Object of Cross-examination.
- § 235. Rules, as to this Examination.
- § 236. Questions as to Motives or Interest.
- § 237. Questions as to Recollection.
- § 238. Questions concise and rapid.

- § 239. Leading Questions allowed.
- § 240. Browbeating Witnesses.
- § 241. Restrictions on Cross-examination.
- § 241a. Questions tending to disgrace the Witness.
- § 242. As to a Conviction for Crime.
- § 243. Questions conveying Opprobrious Titles.
- § 244. Questions involving Admission of Crime.
- § 245. Questions on Irrelevant Matters.
- § 246. Refusing Answers on Ground of Privilege.
- § 247. Limit of Cross-examination in Discretion of Court.

PART III. IN ARGUMENT.

- § 248. Privilege of Argument by Counsel.
- § 249. Argument under Control of Court.
- § 250. To be confined to the Evidence.
- § 251. Reading Authorities in Argument.
- § 252. Comments on Persons and their Acts.
- § 253. Argument on the Law.
- § 254. Limiting Time of Argument.
- § 255. Responsibility of Counsel in Argument.

§ 204. *Scope of the Present Inquiry.* — Twelve good and true men — *bonos et legales homines* — having been at length obtained and duly sworn, are now ready to have the issue submitted to them.

It is now proposed to enter into a consideration of the duty and relation of counsel to the jury, and the privileges and license of counsel in the management and submission of the case. This inquiry will also embrace the consideration of the important right to open and close the case, upon which there is frequently so much discussion.

§ 205. *The privilege to be represented by counsel is not an ancient one* — it is, in fact, of recent origin. This may appear singular to our minds, as we are so accustomed to associate the protection and privilege of an advocate with an accused person when put on his trial.¹ The common law denied

¹ The great advocates of antiquity were not allowed to appear unless they had an interest in the cause. Thus, when Demosthenes defended Ctesiphon, in the oration for the crown, it is apparent that he considered himself upon his trial, for the charge that Aeschines had brought against Ctesiphon was that he had illegally proposed that Demosthenes should be rewarded for his patriotic exertions by a golden crown, and the accusation was intended to give his great rival an opportunity of making an attack upon him. But in after times a relative or friend was allowed to speak on a person's behalf, if he were not able through illness or other inability to conduct his own cause. See Forsyth's *Hortensius*, p. 24.

counsel to the accused upon the general issue, on charges of felony or treason, but in cases of mere misdemeanor or any offence less than felony, it permitted to the party indicted a full defence by counsel.¹ If a point of law, however, were raised, the privilege was allowed.

When the Duke of Norfolk was indicted for high treason in the reign of Elizabeth, he made a touching appeal to the court for the aid of counsel, but in vain.²

In the trial of Colonel Lilburne for treason during the time of Cromwell, he begged the judges to assign him counsel, saying: "If you will not assign me counsel to advise and consult with, I am resolved to go no further, though I die for it, and my innocent blood be upon your hands."³

Not always on a point of law was the privilege of an argument by counsel permitted. It must be a point on which there may be entertained some doubt; hence, if the judges were agreed on it, no argument was allowed. So Jeffries said to Sidney, "If you assign us any particular point of law, if the court think it such a point as may be worth the debating, you shall have counsel."⁴

We naturally inquire for the reason in denying this privilege on trials where it would be so especially necessary, and granting it in cases where less interests were involved. One reason given was that the court was counsel for the prisoner. But there were occasions when a prisoner had good cause to question this relation of the court to him. Once a prisoner having heard the court give utterance to this rule, and afterwards put a question to a witness tending directly to prove the prisoner's guilt, he exclaimed, "Ah, my lord, if you were my counsel you would not ask that question."⁵

¹ 1 Chitty C. L. 409; 2 Hawk. c. 39.

² 1 How. St. Tr. 965. "I have," he said, "had very short warning to provide to answer so great a matter; I have not had fourteen hours in all, both day and night, and now I neither hear the same statute alleged, and yet I am put at once to the whole herd of laws, not knowing which particularly to answer unto. The indictment containeth sundry points and matters to touch me by circumstance, and so to draw me into matter of treason, which are not treasons themselves; therefore with reverence and humble submission I am led to think I may have counsel. And this I show, that you may think I move not this suit without any ground. I am hardly handled; I have had short warning and no books."

³ 4 How. St. Tr. 1329.

⁴ 9 How. St. Tr. 834.

⁵ Forsyth's *Hortensius*, p. 362.

A reason, though not a satisfactory one, was given by Lord Nottingham, on the trial of Cornwallis. He said in reference to the refusal of counsel: "No other good reason can be given why the law refuses to allow the prisoner at the bar counsel in matters of fact where life is concerned, excepting this, that the evidence by which he is condemned ought to be so very evident, and so plain, that all the counsel in the world should not be able to answer it."¹

§ 206. *The Privilege was given by Statute.* — It was not without opposition that the privilege was conceded, and at last, in 1695, the statute 7 William III. c. 3, was passed, providing amongst other things, that any person accused and indicted, arraigned and tried for high treason, whereby any corruption of blood may follow to any such offender or his heirs, should be allowed defence by counsel, not exceeding two, who shall have free access to the accused at all seasonable hours.² There was an exception made in the twelfth section in cases of impeachment or other proceedings in parliament, and any indictment for high treason for counterfeiting the great seal, or coin of the realm. It was not, however, until 6 & 7 William IV. that the full privilege of a defence by counsel was given in any criminal proceeding. The statute, c. 114, of that session, in its preamble announced the principle, that had too long been overlooked, "that it is just and reasonable that persons accused of offences against the

¹ 7 How. St. Tr. 149.

² The act was appointed to take effect from the 25th March, 1696, and on the 24th of that month Sir William Parkyn was put on his trial for high treason, and it seems astounding and incredible to read that he was denied the favor, either to have counsel or to obtain a postponement to have the benefit of the act. He claimed that the act was but declaratory of the common law inasmuch as it said there was nothing more just and reasonable. "My lord," said he, addressing Lord Chief Justice Holt, "it wants but one day." — *Holt*. "That is as much as if it were a much longer time, for we are to proceed according to what the law is, and not what it will be." He then asked that his trial might be put off for a single day, in which case he would have been entitled, as of right, to that which he now prayed for as a favor; but his application was refused. 13 How. St. Tr. 72. The first instance on record when counsel was assigned under the act was on the trial of Rookwood and others, on which occasion Sir Bartholomew Shower and Mr. Phipps defended the prisoners. And they thought it necessary to define their position in doing so by a deprecatory explanation! See 13 How. St. Tr. 145.

law, should be enabled to make their full answer and defence to all that is alleged against them." It would seem so obvious and so unquestionable a right, that the wonder is that it was so lately established, and still a greater wonder that such a privilege should have been opposed for centuries. In this country the right to be represented by counsel is deemed so vital, so sacred, that it is embodied among other cherished rights in our fundamental law, in terms similar to the following provision in the California Constitution: "In any trial in any court whatever, the party accused shall be allowed to defend in person and with counsel as in civil actions."

PART I. RIGHT TO OPEN.

§ 207. *Advantage of the Right.* — The advantage of opening the case to the jury is one of considerable importance, and is therefore highly valued. The party who first catches the attention of the jury by his statement has evidently an advantageous position; for, from the nature of the tribunal, if the case is presented in a clear and striking manner by an able advocate, an impression must be made which will not be easy to remove subsequently.¹ And this impression is

¹ The advantage of having the opening statement to a jury or any body of men is well known. Let any one read the arraignment of the charges against Queen Caroline, as they were presented and minutely portrayed by the king's solicitor general, and it would almost seem an overwhelming, irresistible case, and one wonders how such evidence could be nullified; yet under the consummate management of Lord Brougham, the witnesses were discredited and so confounded that the case was at length abandoned. Another example in point is the arraignment of Warren Hastings, by the celebrated speech of Edmund Burke when he depicted the offences in such a condemning, convincing light, that even the accused is said to have understood himself to be the guiltiest person living. See Macaulay's Essay on Warren Hastings.

There is a maxim — *audi alteram partem* — hear the other side, or more commonly expressed, "One tale is good, till another be told;" but this can only be borne in mind by those accustomed by experience and discipline to a patient examination of both sides. The story of the highway robbery by Prince Henry and his "wonted followers," had two sides; and the version as given by Falstaff soon dissolved before that of the prince. "Mark now," said the prince to Falstaff, "how plain a tale shall put you down." Hen. IV. part 1, act 2. There is a good observation regarding the tendency in lawyers to suspend their judgment, in Ram on Facts, where he says: "A tendency to suspend his judgment on hearing one side only of a case can scarcely fail to be a result of an advocate's practice. On any question in any transaction of life in which there may be opposite sides, he, having heard one side only, is sure to inquire what can be said on the other; it instantly occurs to him to say *audi alteram partem*. This fruit of his

further strengthened, and therefore the advantage is yet more desirable, by the fact that a party who opens has the right to close, in case his adversary thinks fit to call witnesses.

It is obvious, therefore, that this privilege should be well settled, and that it should not be a matter depending altogether upon the discretion or convenience of the court.

In criminal proceedings the practice is uniform; but there has been considerable uncertainty in civil cases, and a writer remarks that "the authorities on the subject present almost a chaos!"¹ There is, however, a more settled practice of late, and the rules securing the right are better established, and more uniformly applied. The decisions are not yet harmonious; but there is no greater divergence on this subject, than upon others whose principles are well recognized.

§ 208. *Procedure in Criminal Trials.* — The mode of proceeding in criminal cases, according to Chitty,² was, that when a full jury had been obtained and sworn, the clerk directed the crier ("countez," which in practice became "count these") to count the jury, who, having done so, said to the jury, "twelve good men and true, stand together and hear your evidence;" after which the other jurors summoned were discharged by the court. Then the clerk directed proclamation to be made by the crier in the following form: "If any one can inform our lords, the king's justices, the king's serjeant, or the king's attorney on this inquest to be taken between our sovereign lord the king and the prisoners at the bar, of any treason, murder, felony, or other misdemeanor, committed or done by them, let them come forth and they shall be heard; the prisoners stand at the bar upon their deliverance, and all others that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth and give their evidence, or else they forfeit their recog-

study and practice is truly valuable. A hasty conclusion on hearing one side only is, in every-day life, frequently an occasion of much misconception of things really said or done, of coolness or heat between friends, of injurious acts, and even of irremediable injustice." Page 270, Am. ed.

¹ Best on Evid. § 637. "The decisions upon this subject have been numerous and conflicting, and it is certainly difficult to lay down rules for guidance in all cases." Starkie on Evid. p. 596.

² 1 Crim. L. 552.

nizance." After this proclamation the trial commences by the prosecuting officer opening the case for the crown.

§ 209. *Duty of Counsel in opening.*—Our mode of beginning is more direct and informal. As soon as the prisoner is arraigned, and his plea recorded, the prosecuting officer, or counsel for the people, opens the case, explains the nature of the charge in the indictment, points out the circumstances attending the crime wherewith the defendant is charged, and the general nature of the evidence to be produced on behalf of the people to sustain the charge; and then enters upon the examination of witnesses. Without entering upon the general duty of counsel at present, we may say that in opening he is allowed a considerable latitude in stating his case, in its circumstances, details, and relations; he can use invective, denunciation, and warning; he can appeal to feeling, detestation of crime; regard for order, patriotism, or morality; but there is a limit beyond which it would be unjust for him to transcend. He ought not to be permitted to excite class or religious prejudices; to appeal to personal or local feelings; or to stir up hate or animosity against a party. It was therefore held to be error when the counsel for the State in a murder trial commented on the frequent occurrence of murder in the community, and the formation of vigilance committees and mobs, and stated that the same were caused by laxity in the administration of law, and that the jury should make an example of the defendant.¹

The counsel for the accused should, at the time when such an abuse occurs, interpose his objection, if he wishes to make the exception available on appeal.²

The following summary gives a counsel's duty in opening very clearly and concisely; though given in a civil case, it is nevertheless generally applicable: "In opening a case to the jury, the counsel should confine himself to a brief statement of the cause of action, the substance of the pleadings, the points in issue, the facts and circumstances of the case, and

¹ *Ferguson v. State*, 49 Ind. 33.

² *State v. Watson*, 63 Maine, 128; *Commonwealth v. Cunningham*, 104 Mass 545.

the substance of the evidence to be adduced in support of it." ¹

§ 210. *Especially in Criminal Cases.* — The opening statement of counsel should carefully indicate the nature and extent of his evidence: especial care being taken that no greater *amount* of evidence be promised than can be produced, as a failure to produce evidence to substantiate the facts alleged, will cause the jury to look with suspicion on his case, and will give the opposite side a good opportunity to point out and comment on the failure.² A signal example of such a mistake happened in the trial of Queen Caroline, and the failure to bring forward the promised evidence gave Lord Brougham a fine opportunity to charge a failure on the prosecution in his opening for the defence.

In opening, the counsel should state declarations to be proved, as well as facts, unless the declarations amount to a confession.³ Where there is counsel for the prisoner, the counsel for the prosecution ought always to open and close; but he should not open if the prisoner has no counsel, unless there is some peculiarity in the facts of the case to require it.⁴

¹ *Ayrault v. Chamberlain*, 33 Barb. 229. Whatever invidious comparison may be made between the advocates of the present day and those of former times, it must be admitted that in one respect at least there is a commendable advantage. We do not meet with the indiscriminate denunciation, the bitter animadversion, the personal vituperation in prosecutions that was such a melancholy feature of accusations in former days. Then an accused was held up in a most repulsive light, every fact and detail connected with his life distorted and magnified to his disadvantage and condemnation. In the trial of Lilburne for treason, reported in the 4th volume of Howell's State Trials, we cannot but admire the manly, straightforward bearing of Lilburne, when he spiritedly rebuked the attorney general, who forgot the humane maxim of the law, that every man is presumed to be innocent until he is proved to be guilty, and pleaded so urgently and eloquently for the privileges of counsel. Quintilian lays down an admirable rule for the guidance of counsel in this situation; it is worthy of imitation. He says: "Sometimes the duty imposed upon an advocate compels him to make strictures upon a whole class of men, as, for instance of freedmen or soldiers, or farmers of the revenue, or such like. In all which cases the general rule is to appear reluctant to say anything offensive, and to make no indiscriminate attacks, but confine one's self to the proper object, and where censure is bestowed, to compensate this by some words of panegyric." Inst. Orat. xi. 1.

² *Rex v. Hartel*, 7 C. & P. 773; *Rex v. Davis*, 7 C. & P. 785; *Reg. v. Butcher*, 2 M. & Rob. 228; *Reg. v. Beard*, 8 C. & P. 142.

³ *Rex v. Davis*, *supra*.

⁴ *Rex v. Gascoigne*, 7 C. & P. 772.

With respect, however, to this last assertion, there is not entire agreement. Serjeant Talfourd, on the duties of counsel for the prosecution, says: "When the counsel for the prosecution addresses the jury, in a case of felony, he ought to confine himself to a simple statement of the facts which he expects to prove; but in cases where the prisoner has no counsel, he should particularly refrain from stating any part of the facts, the proof of which, from his own brief, appears doubtful, except with proper qualification; for he will either produce on the minds of the jurors an impression which the mere failure of the evidence may not remove in instances where the prisoner is unable to comment on it with effect, or may awaken a feeling against the case for the prosecution which in other respects it may not deserve."¹

§ 211. Right to begin. — In criminal cases, the government, holding the affirmative of the issue, is entitled to open the case to the jury. It is maintained that the burden of proof is on the government throughout, no matter what the defence may be. As the jury are to be convinced beyond a reasonable doubt that the defendant is guilty in the manner and form as charged in the indictment, therefore it is incumbent on the prosecuting officer to prove the affirmative, and therefore it is his right to open.²

When the defendant pleads insanity, it is still the duty of the prosecution to prove to the jury not only that the defendant committed the act constituting the *corpus delicti*, but also, that at the time of its commission, he had intelligence and capacity enough to have a criminal intent and purpose.³

In the case of *Commonwealth v. Eddy*,⁴ which was an in-

¹ Dickinson's Quarter Sessions, p. 495.

² *Commonwealth v. McKie*, 1 Gray, 61; *People v. McCann*, 16 N. Y. 58. The State's attorney in a public prosecution is entitled to the opening and the close of the argument, although the prisoner offers no evidence. *State v. Millican*, 15 La. An. 557.

³ *Commonwealth v. Rogers*, 7 Met. 501. See *Commonwealth v. Hawkins*, 3 Gray, 465.

⁴ 7 Gray, 583. See *Chase v. People*, 40 Ill. 352; *State v. Bartlett*, 43 N. H. 224; *Graham v. Commonwealth*, 16 B. Mon. 587; *People v. Coffman*, 24 Cal. 230; *Hopps v. People*, 31 Ill. 385. But under the Minnesota statute requiring the jury to state by their verdict that they find the prisoner insane, if they acquit him on that ground, the burden of proving insanity is on the prisoner. *Bonfanti v. State*, 2 Minn. 123.

dictment against the defendant for the murder of his wife, and in which the insanity of the defendant was the ground of the defence pressed on the jury, the court instructed the jury in substance that the burden of proof was on the government throughout, and did not shift; although, so far as the sanity of the defendant was concerned, the burden was sustained by the legal presumption that all men are sane, which presumption must stand until rebutted by proof to the contrary, satisfactory to the jury.

§ 212. The party holding the affirmative opens, whether it be the plaintiff or the defendant. This is the leading, cardinal rule on this point, in its broadest, most general terms, subject, however, to a few exceptions and limitations. It is sometimes stated in this manner: *the party on whom the onus probandi lies as developed on the record must begin*.¹

The affirmative being generally on the part of the plaintiff, it is he who ordinarily has the right to begin. Even when the plaintiff's case is admitted by the defendant, and there is left something for him to prove, as to show the amount of unliquidated damages.²

But where the facts stated in the complaint are admitted on a money demand on contract, and there is nothing required to be proved to complete a judgment, except to make a mere computation of interest, the opening does not lie with the plaintiff.³

For a long time in England the question was in doubt as to who had the right to begin in certain actions where the defendant set up some affirmative defence, and admitted the plaintiff's cause of action. At last it was set at rest by the decision of Lord Denman, in *Mercer v. Whall*,⁴ when it was declared that, "in actions for libel, slander, and injuries to

¹ *Costigan v. Mohawk & Hudson R. R. Co.* 2 Denio, 609; *Powers v. Russell*, 13 Pick. 69; *Burnham v. Allen*, 1 Gray, 496; *Jarboe v. Scherb*, 34 Ind. 350.

² *Hecker v. Hopkins*, 16 Abb. Pr. 30 (n.); *Aurora v. Cobb*, 21 Ind. 492; *Ayer v. Austin*, 6 Pick. 225; *Comstock v. Hadlyme*, 8 Conn. 261; *Cox v. Vickers*, 35 Ind. 27; *Baltimore R. R. Co. v. McWhinney*, 36 Ind. 436.

³ *Brennan v. Security, &c. Ins. Co.* 4 Daly (N. Y.), 296; *Fowler v. Coster*, 1 Mood. & M. 243; *Bonfield v. Smith*, 2 M. & Rob. 519; *Cannam v. Farmer*, 2 C. & Kir. 746.

⁴ 6 C. & P. 64.

the person, the plaintiff shall begin, although the affirmative issue is on the defendant."¹

In this case Lord Denman showed clearly the grounds of the rule, that because the defendant admitted the plaintiff's *prima facie* case, he was often permitted in this manner to open his defence to the jury, anticipate the plaintiff's case, and adapt his own proof accordingly. He said: "It appears expedient that the plaintiff should begin, in order that the judges, the jury, and the defendant himself should know precisely how the claim is shaped. This disclosure may convince the defendant that the defence which he has pleaded cannot be established. On hearing the extent of the demand, the defendant may be induced at once to submit to it rather than persevere. . . . Of the disadvantages that may result from it (allowing the defendant to open in such cases), one is the strong temptation to a defendant to abuse the privilege. If he well knows that the case can be proved against him, there may be skilful management in confessing it by his plea, and affirming something by way of defence, which he knows to be untrue, for the mere purpose of beginning." In the application of the rule, the difficulty will be to determine who has the affirmative, or on whom is the *onus probandi*. A practical rule for determining this has been laid down in an English case. It is: Consider which party would be entitled to the verdict, supposing no evidence given on either side; then the burden of proof must lie on his adversary.² The same test is laid down in *Viele v. Germania Life Ins. Co. in Iowa*.³

§ 213. When the record contains several issues, and the plaintiff is compelled to prove any one of them, he has the right of opening.⁴ So, in determining which party is to begin

¹ So in an action for libel where the facts are admitted by the answer, but the plaintiff has the burden of showing malice and damages; he has the right to open and conclude. *Opdyke v. Weed*, 18 Abb. Pr. 223.

² *Leete v. Gresham Life Ins. Co.* 7 Eng. L. & Eq. 578; *Amos v. Hughes*, 1 M. & Rob. 464.

³ 26 Iowa, 9; *Chesley v. Chesley*, 37 N. H. 236.

⁴ *Rawlins v. Desborough*, 2 M. & Rob. 328; *Jackson v. Pittsford*, 8 Blackf. 194; *Lexington Fire Ins. Co. v. Paver*, 16 Ohio, 324; *Belknap v. Wendell*, 1 Fost. (N. H.) 175; *Loggins v. Buck*, 33 Tex. 113.

and close, it is not so much the form of the issues which is to be regarded as their substance and effect. If anything is left for the plaintiff to show affirmatively, the right to commence and close is with him.¹

Whenever the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case, and is therefore entitled to reply.² The question will then arise, how far he shall proceed in his proof to meet the defence on that and other issues. This is regulated by the discretion of the judge according to the circumstances of the case, having regard to the question whether the whole defence is indicated by the plea with sufficient particularity to render the plaintiff's evidence intelligible.³

Though the plaintiff have the affirmative on any one of many issues, and does not undertake to give evidence on it, he does not thereby obtain the right to open and close. Thus, if to some special count claiming liquidated damages, the plaintiff adds the common money counts, and the defendant confessing and avoiding the former, pleads the general issue to the latter, this will not entitle the plaintiff to begin, unless in fact he intends to rely on the common money counts, and to adduce evidence in support of them, for the only object of an opening is to explain to the jury the facts which are to be proved by the witnesses.⁴

§ 214. The defendant begins when he admits the plaintiff's cause of action, and sets up new matter in defence.⁵ This was the old plea of confession and avoidance. Then the *onus probandi* falls upon the defendant, and under the rule he

¹ Chesley v. Chesley, 37 N. H. 229.

² Greenleaf on Evid. § 74; Jacobs v. Tarleton, 11 Q. B. 421. See Wright v. Wilcox, 19 L. J. C. P. 333.

³ Rees v. Smith, 2 Starkie, 31; James v. Salter, 1 M. & Rob. 501; Curtis v. Wheeler, 4 C. & P. 196. In Alabama the practice was settled to allow the plaintiff to open and close in all cases, no matter what the form of the issue was. Chamberlain v. Gaillard, 26 Ala. 504.

⁴ Smart v. Rayner, 6 C. & P. 721; Faith v. McIntyre, 7 C. & P. 44; Oakley v. Ooddeen, 2 Fost. & Fin. 656.

⁵ Thurston v. Kennett, 2 Fost. (N. H.) 151; Millard v. Thorne, 56 N. Y. 402; Hoxie v. Green, 37 How. Pr. 97; Ayrault v. Chamberlain, 33 Barb. 229; List v. Kortepeter, 26 Ind. 27; Harvey v. Ellithorpe, 26 Ill. 418; Shank v. Fleming, 5 Ind. 189.

has a right to open and close. So, where the defendant holds the affirmative of all the issues made in the pleadings, and opens the case by calling the first witness, he is entitled to the closing address to the jury.¹ And in a suit on a note, the defendant put in no general denial, but alleged matter in set-off; the plaintiff replied denying the set-off, and alleging affirmative matter, and it was held that the defendant was entitled to open and close.² So, in a suit on a contract where the answer was that it was obtained by fraud, and a reply of denial was made, the defendant should have the right to open and close.³

In an action of replevin, where the defendant sets up a lien on the goods, it is his right to open and close. The proof of value required to be given by the plaintiff is incidental, and does not affect the right.⁴

So, in actions of trespass *quare clausum fregit*, where the defendant sets up any defence in justification, as claiming a title to the property, or justifying any part of the trespass, when the damages are laid only in the usual formula of treading down the grass, and subverting the soil, the defendant is permitted to begin and reply, there being no proof required on the part of the plaintiff.⁵

But a defendant has not a right to open and close in a suit to recover for medical services, when an admission of services is made, and that the charges were regular, but alleges unskilful and negligent treatment of the plaintiff. The burden is then in the first instance on the plaintiff to show proper and due treatment.⁶ In Indiana it has been decided under the Code, that when a complaint is confessed and avoided, and the answer is wholly denied, and also confessed and avoided, the defendant has the right to open.⁷

§ 215. The defendant must admit the plaintiff's whole

¹ *Elwell v. Chamberlain*, 31 N. Y. 611.

² *Bowen v. Spears*, 20 Ind. 146.

³ *Patton v. Hamilton*, 12 Ind. 256.

⁴ *McLees v. Felt*, 11 Ind. 218.

⁵ *Hodges v. Holden*, 3 Campb. 366; *Pearson v. Coles*, 1 M. & Rob. 206; *Leech v. Armitage*, 2 Dall. 125; *Caskey v. Lewis*, 15 B. Mon. 27. In a complaint for flowing land, if the defendants plead a prescriptive right to flow it, they should open. *Davis v. Brigham*, 29 Maine, 471.

⁶ *Graham v. Gautier*, 21 Tex. 111.

⁷ *Judah v. Vincennes University*, 23 Ind. 273.

title, in order to obtain the right to open and close. Thus, if a party claiming premises as heir-at-law of the person last in possession brings an action of ejectment against a devisee under such person's will, the defendant, as it seems, is entitled to begin, when he admits that the plaintiff is heir, and also that the ancestor through whom he claims died seised of the estate.¹

Simply admitting the plaintiff has a *prima facie* case, will not do; the facts constituting his action must be admitted, if the defendant seeks to obtain the right to open.²

If the defendant in ejectment were to admit at the trial a will under which the plaintiff claimed, and were to rely on a subsequent devise or codicil, he ought not to be permitted the right to begin, because he does not admit the *whole* title of the plaintiff.³ So, if the defendant's title rests upon a conveyance from the ancestor, or if he claims even in part, under the ancestor's marriage settlement, he cannot by simply admitting the heirship of his opponent and his possession, deprive the former of his right to begin, because by such an admission the entire title of the plaintiff is not covered.⁴

The general rule would seem to be that the defendant, who claims the right, should make such an admission as, if set out on the record, would, together with the facts which he is about to prove, amount to a plea of confession and avoidance. Thus, in an action of assumpsit for goods sold and delivered, a plea in abatement was the non-joinder of another defendant, and issue was joined thereon. It was held that if the defendant would admit the amount claimed, he could begin.⁵

§ 216. Where a party relies on a negative allegation as the foundation of his cause of action, the burden of proof may be upon him, and he is required to open the case. This, of course, only holds good where it is *within his power* to sup-

¹ Goodtitle v. Braham, 4 T. R. 498; Doe v. Barnes, 1 M. & Rob. 386; Doe v. Smart, Ibid. 476. In the last case the defendant was allowed to begin, though the plaintiff, as to part of the premises, was prepared to prove that he was assignee of an outstanding term.

² Wigglesworth v. Atkins, 5 Cush. 212.

³ Doe v. Brayne, 5 Com. B. 655.

⁴ Doe v. Tucker, M. & M. 536; Doe v. Lewis, 1 C. & Kir. 122.

⁵ Bonfield v. Smith, 2 M. & Rob. 519.

port the negative allegation ; for a negative may sometimes admit of proof. Thus, in an action for a malicious prosecution, *without probable cause*, it is seen the action is based on a negative averment, requiring the plaintiff, to maintain his case, to give some affirmative proof to show a want of probable cause.¹ And the same is the case in actions for a penalty given by statute, where the gist of the action depends upon some negative averment, and then it must be supported by some presumptive proof. As for example, in an action for coursing deer in inclosed grounds, *not having the consent of the owner* ;² or for cutting trees on land not belonging to a party ; or taking property, not having the consent of the owners.³ At best, in such cases, conclusive proof cannot be generally given ; it is sufficient if such a degree of proof be adduced as would give a reasonable presumption, if no proof were offered on the other side. A good example in point is the case where an action was based on an agreement to pay the plaintiff £100, if he would not send herrings for one year to the London market, and in particular to the house of J. & A. Millar, proof that he sent none to that house was held sufficient to entitle the plaintiff to recover, in the absence of opposing testimony.⁴

§ 217. Where the knowledge of the allegation is confined to the other party, that party should be required to prove the allegation, whether it be of an affirmative or a negative character. In stating the proposition in the last section, we qualified it by holding that the negative was only to be proved when it was within the power of the party to do so. This was clearly held in *Dickson v. Evans*,⁵ by Ashhurst, J., when he said: "It is a general rule of evidence that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant ; but it is said in this case, that it was incumbent on the assignees to prove the time when the defendant received these notes.

¹ *Purcell v. Macnamara*, 1 Campb. 199 ; *Ulmer v. Leland*, 1 Greenl. 134.

² *Rex v. Rogers*, 2 Campb. 654.

³ *Little v. Thompson*, 2 Greenl. 128.

⁴ *Calder v. Rutherford*, 3 B. & B. 302 ; 1 Greenl. Ev. § 78.

⁵ 6 T. R. 57.

But the assignee could have no means of knowing that fact, whereas it must have been known to the defendant; and as the latter relied upon it as the ground of his set-off, and did not prove it, the assignees were entitled to recover.”¹ The instances when this rule is applied are in prosecutions for penalties for doing certain acts, not lawful except by certain qualified persons, as for selling liquors, exercising a trade or profession. Because the person, if in possession of the required license, can easily show it without any inconvenience.

§ 218. **Right where Wills are contested.** — The question as to the right to open and close in cases of contested wills frequently arises, and it has been variously decided. We shall examine this question in view of the principles just established, regulating the right of opening, together with a view of the authorities on the subject.

The authorities agree to this extent, that in propounding a will for probate, the proof as to its due execution is upon the party propounding the will, who is ordinarily the executor.² The question upon which a difference of opinion exists, is as to the party on whom the burden of proof rests when a will is attacked on account of the incapacity of the testator, from insanity or other causes, when there is no question as to the due execution of the will. Redfield says: “But it is undoubtedly true, that some apparent confusion exists in regard to the declarations of different judges as to which party assumes the burden of proof, in trials, where the incapacity of the testator is alleged.”³

§ 219. **Reasons of the Difference of Opinion.** — An examination of the cases will show that the divergence in the decisions as to which party had the right to open and close, was occasioned by a misapprehension of the term, “burden of proof.” In many of the cases, it is stated that the burden of proof is upon the party who declares the incapacity of the tes-

¹ See, on this point, *Rex v. Turner*, 5 M. & Sel. 206; *Smith v. Jeffries*, 9 Price, 257; *Sheldon v. Clark*, 1 Johns. 513; *Commonwealth v. Kimball*, 7 Met. 304; *Haskell v. Commonwealth*, 3 B. Mon. 342; *Shearer v. State*, 7 Blackf. 99; *United States v. Hayward*, 2 Gall. 485.

² 1 Greenleaf on Evid. § 77; 1 Redfield on Wills, 30.

³ 1 Wills, 31.

tator, and from this an erroneous inference has followed, that it was the right of that party to open and close. Now the burden of proof, it must be admitted, does not always remain on one and the same side in the course of an issue; it may shift, depending upon the nature of the pleadings and proof. Undoubtedly, as all men are presumed sane until the contrary is shown, the burden is therefore on a party asserting one's insanity, to prove its existence at the time when the will was executed, after the party propounding it has shown its due execution.¹ But because the burden of the proof of this fact is then assumed, does this necessarily give the party the right to open and close? Let us consider the nature of the issue presented when a will is contested on the ground of incapacity in the testator. On one side there is a party claiming under the will, who *affirms* it has been *duly* executed; on the other hand is the contesting party, denying the instrument to be a will for want of capacity in the testator. Now this want of capacity is a negative averment; can it be maintained under the affirmative of the issue, assuming the party claiming under the will to have this part of the issue?

If there was no presumption of law in the proponent's favor, *and if the proof of this negative was peculiarly in the knowledge of the other party*, according to the rule the latter should begin. But there is a presumption in favor of the party holding under the will, that the testator was sane, and a small degree of proof is sufficient, therefore, to maintain this presumption, in case the will is objected to on the ground of the testator's incapacity; which then throws the burden of the proof on the other side. This will bring the case within the rule laid down in a former section,² and entitle the party claiming under the will to open.

§ 220. The party upholding the will should begin, according to principle, and according to the best and the greatest number of authorities. The leading case on this point is the

¹ "It must be admitted, we think, upon careful examination of all the cases, that the burden of the proof of insanity, in the case of a will, equally with that of a deed or other contract, is upon the party alleging it, and who claims the benefit of the fact when established." 1 Redf. on Wills, 32.

² Vide § 216.

case of *Delafield v. Parish*, in New York, argued with consummate ability on both sides by eminent counsel, and decided by an able court.¹

A statement is found in this case that does not harmonize with other authorities. It is stated by Davies, J., "that this burden is not shifted during the progress of the trial, and is not removed by proof of the *factum* of the will, and the testamentary competency by the attesting witnesses, but remains with the party setting up the will." This is not found in the syllabus, and is not supported by respectable authorities. It is precisely on this point that confusion has arisen, and in consequence the decisions have been misunderstood. *Redfield* holds the contrary; and in *Brooks v. Barrett*,² it is held that the burden of proof is upon the party objecting to the will on the ground of insanity, after the will has first been proved according to the statutory evidence. The case from which misapprehension has arisen is *Harris v. Ingledew*,³ which holds it is necessary to prove the sanity when a will is propounded; but this in reality holds that a stricter degree of proof is required in the case of a will than in the execution of other instruments.⁴

In an early case in New York, it was held that there was no distinction in respect to the proof of wills, and of other instruments. It was said, "In all cases where the act of the party is sought to be avoided on the ground of his mental imbecility, the proof of the fact lies upon him who alleges it, and, until the contrary appears, sanity is to be presumed."⁵

¹ 25 N. Y. 9. The following authorities support the same view: 1 *Greenleaf* on Evid. § 77; 1 *Redfield* on Wills, 31; *Randebaugh v. Shelley*, 6 Ohio N. S. 307; *Brown v. Griffiths*, 11 Ohio N. S. 329; *Banning v. Banning*, 12 Ohio N. S. 437; *Benoist v. Murrin*, 58 Mo. 321; *Tingley v. Cowgill*, 48 Mo. 295. The cases of *Farrell v. Brennan*, 32 Mo. 328, and *McClintock v. Curd*, *Ibid.* 411, are not approved in that State. *Harris v. Vanderveer*, 21 N. J. Eq. 561; *Williams v. Robinson*, 42 Vt. 658; *Boyd v. Boyd*, 66 Penn. St. 293; *Beazley v. Dennison*, 40 Tex. 416; *McGinnis v. Kempsey*, 27 Mich. 363; *Boardman v. Woodman*, 47 N. H. 120. *Contra*, *Chandler v. Ferris*, 1 Harrington, 460, in note; *Tilman v. Hatcher*, Rice, 271.

² 7 Pick. 94.

³ 3 P. Wms. 91.

⁴ See a criticism on this case in 1 *Redf.* p. 32, note.

⁵ *Jackson v. Van Dusen*, 5 Johns. 144, 158. The most approved doctrine on this subject is held in the case of *Barry v. Butlin*, 1 *Curtis*, 637, 640, which is recommended by *Redfield*.

§ 221. The right to reply is a necessary incident to the right to begin, whenever an adversary adduces evidence in support of his case.¹ And this is the rule in civil and criminal cases. Where a controversy arises as to the admission of evidence, and witnesses are called to give evidence as to this matter alone, the right to reply is not thereby obtained, for these witnesses were not called to give evidence to the jury but to the court.² The mere commenting on a cash book, which has been used to refresh the memory of an adverse witness, or even a reference to parts of this book, not looked at by such witness, will not entitle the opposite counsel to reply.³ Nor will the right be gained by the production of a paper which the judge has called for in order to satisfy his conscience.⁴

When several prisoners are on trial on a joint indictment, if evidence be produced on behalf of any one, the counsel for the prosecution has then a right to reply generally, if the charge be a joint one; though if it be a separate one, as for stealing and receiving, he should limit his remarks in reply to the case of the party on whose behalf witnesses are called.⁵ It was resolved by the judges, that, "if the only evidence called on the part of a prisoner is evidence to character, although the counsel for the prosecution is entitled to reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper to do so."⁶

§ 222. Remedy if Right be refused. — If the right be an advantageous one, as it is generally admitted to be, it must work an injury to a party to deny him such right. For some time in England it was held that the rule as to the right to begin was a matter resting with the discretion of the judge at *nisi prius*; and that, therefore, an error made was not cognizable on appeal.⁷ And this has had some countenance in

¹ Taylor on Evid. § 361.

² Harvey v. Mitchell, 2 M. & Rob. 366; Dover v. Maestaer, 5 Esp. 96.

³ Pullen v. White, 3 C. & P. 434.

⁴ Dowling v. Finigan, 1 C. & P. 587.

⁵ Rex v. Hayes, 2 M. & Rob. 155; Rex v. Jordan, 9 C. & P. 118.

⁶ 7 C. & P. 676.

⁷ Best on Evid. § 638, and cases cited.

our courts, but not quite to this extent. For it was held in some places, that there must be a clear case of injustice, before a higher court would interfere with the ruling of the court below.¹ Thus, it is held that while the right to review the question as to the right to open and close is not absolutely denied, yet there must be a clear case of prejudice in order to justify a reversal upon that ground.²

This agrees with the position the decisions have established in England, which hold that while it is a matter resting to a great extent in the discretion of the court, yet, where "clear and manifest wrong" had resulted, a new trial will be granted by the court, not as a matter of right, but as a matter of judgment.³

Generally our courts go farther than this, and allow a new trial as a matter of right, where an exception has been taken. But it must be where the right belongs manifestly and unquestionably to a party, and is refused at the trial. So, a late case in New Hampshire holds, the party on whom the burden of proof devolves in the first instance has the right to open and close at the trial, and an error in the ruling of the court in this respect is a good ground of exception.⁴ And in an action for the removal of a partition fence under an answer that it belonged to the defendant, who gave due notice, it was held error to allow him to open and close;⁵ and so it has been held that where the answer admits the making and delivery of a promissory note sued upon, and sets up an affirmative defence, a denial to the defendant to open and close is error.⁶

PART II. THE EXAMINATION OF WITNESSES.

§ 223. *Importance of Duty.* — There is no part of the duty of a counsel before the jury so responsible and important as the examination and cross-examination of witnesses; it is then he lays the facts and basis for his argument, without

¹ *Marshall v. Wells*, 7 Wis. 1. See *Fry v. Bennett*, 28 N. Y. 324.

² *Preston v. Walker*, 26 Iowa, 205.

³ *Edwards v. Matthews*, 11 Jur. 398; *Brandford v. Freeman*, 5 Exch. 734; *Ashby v. Bates*, 15 M. & W. 589; *Mercer v. Whall*, 5 Q. B. 447.

⁴ *Judge v. Stone*, 44 N. H. 593.

⁵ *Haines v. Kent*, 11 Ind. 126.

⁶ *Linsley v. European Petroleum Co.* 3 Lans. 176.

which that argument, though brilliant and eloquent, cannot be convincing and effective, and it is then he impresses the jury, either favorably or unfavorably, by his demeanor towards the witnesses. Ability displayed in cross-examination has always been recognized as entitling a counsel to especial merit and distinction, and eminent success in this respect has sometimes placed a person in a commanding and conspicuous position in his profession. The qualities of mind necessary to conduct a successful cross-examination are not often possessed. There must be subtlety and tact, general knowledge and readiness, quick apprehension and discrimination of character, patience and imperturbability, courtesy and mildness in demeanor.¹

As an instance where a successful cross-examination established the reputation of an advocate, and gave him a conspicuous position in his profession, the case of Lord Kenyon, on the trial of Lord George Gordon, is in point.

The witness testified that a certain flag was carried in a procession, when he was interrogated as follows:

Kenyon. "Can you describe the dress of this man you saw carrying a flag?"

A. "I cannot charge my memory; it was a dress not worth minding — a very common dress."

K. "Had he his own hair, or a wig?"

A. "If I recollect right, he had black hair; shortish hair, I think."

K. "Was there anything remarkable about his hair?"

A. "No, I do not remember anything remarkable; he was a coarse looking man, he appeared to me like a brewer's servant in his best clothes."

K. "How do you know a brewer's servant in his best clothes from any other man?"

A. "It is out of my power to describe him better than I do. He appeared to me to be such."

K. "I ask you by what means you distinguish a brewer's servant from any other man's?"

¹ "Calmness and temper are required in any one who would successfully examine witnesses. These qualities it may be difficult for one pleading his own cause to maintain, even in the examination of his own witnesses; and they will be put to a much severer test when he comes to cross-examine the witnesses of his adversary." *Ram on Facts*, p. 232, Am. ed.

A. "There is something in a brewer's servant different from other men."

K. "Well, then, you can tell us how you distinguish a brewer's servant from any other trade?"

A. "I think a brewer's servant's breeches, clothes, and stockings have something very distinguishing."

K. "Tell me what in his breeches, and the cut of his coat and stockings, it was by which you distinguished him?"

A. "I cannot swear to any particular mark."

This was likely the truth; yet it is related that the witness was hooted from the witness box, as if he had sought to impose on the jury. Erskine, who was engaged with Kenyon in the case, in his address to the jury, adroitly took advantage of the temporary prejudice. "You see," said he, "gentlemen, by what strange means villainy is detected."¹ At this time Lord Kenyon had but a short experience at the bar; but this cross-examination alone established his reputation as an advocate.

§ 224. *Examination in Chief.*² — In the examination of an advocate's own witnesses, there is not the same degree of skill, forbearance, and ingenuity required, nor are there likely to be the same abuses as in the case of the examination of adverse witnesses. We shall but briefly refer to this part of the duty of counsel, premising that there are only a few leading rules established, because such examination must largely depend on the counsel's own idea of the case, its facts, relations, and results, and must also depend upon his own discretion, as controlled by that of the court.³ There is not much need to fear that he will indulge in any unnecessary embarrassment, or annoyance of his witnesses, as may happen in a cross-examination. We will indicate two or three leading principles, that are well

¹ See 21 How. St. Tr. 599. Erskine seized this opportunity to turn the witness' answer to ridicule, saying to the jury: "Gentlemen, you will not, I am sure, forget whenever you see a man, about whose apparel there is anything particular, to set him down for a brewer's servant."

² As soon as the witness has been duly sworn, it is the province of the party by whom he is produced to examine him. This is called his *direct examination*, or his *examination in chief*. Taylor on Evid. § 1262.

³ "This subject lies chiefly in the discretion of the judge before whom the cause is tried, being from its very nature susceptible of but few positive and stringent rules." Taylor on Evid. § 1258.

established and recognized by the courts, as to a counsel's duty in the examination of his own witnesses.

§ 225. *Demeanor in Respect to one's own Witnesses.*— It becomes the duty of counsel to study the disposition of his own witness, and govern his manner towards him accordingly. There cannot be a better statement of the demeanor required in this respect than that given by an approved writer,¹ thus: "It is obviously advantageous to the side examining his own witness, that the witness be in a composed state of mind, and free from any cause to ruffle his temper. The advocate, therefore, examining him will probably think it to be his first care to remove any timidity in the witness, to soothe all nervous excitement in him, to set him as far as possible at his ease. This may often be effected by, as an introduction to his evidence, asking him questions of his name, age, place of abode, and the like simple inquiries easily answered. Self-possession being infused into him at the outset, it will then be a chief object to sustain it, by throughout the examination addressing the witness in a gentle, conciliatory tone and manner. It will plainly much assist to preserve the witness' composure and self-possession to interrogate him in words unambiguous and easily understood; and if the witness be of humble life, to make use of common and homely words likely to be most familiar to him;² and, as occasion is found, to borrow and take advantage of provincial words and phrases used in the place or district where the witness lives. And on this head it may be useful to bear in mind, that persons in a low station of life understand and use many words in a sense different from the common meaning of them among educated persons. The witness may not understand the expressions of the advocate, and, on the other hand, the advocate may not understand those of the witness. A provincial pronunciation of words is also a source of mistakes."

¹ Ram on Facts, p. 208, Am. ed.

² The same writer gives an instance which is an apt illustration of this direction. Where the witness, who was a "small farmer," was asked:

Q. "Did you hear N. predict anything?"

A. "I did not hear him predict anything."

Q. "Do you know what a prediction is?"

A. "No; I have been at work ever since I was seven years old."

§ 226. **Not to put Leading Questions.**— That an examiner must not put a leading question to his witness is a rule invariably laid down, and one on which objections are most frequently based.

A leading question is one that suggests to the witness the answer required or desired, or such a question as embodies a material fact, admitting of a simple negative or affirmative answer.¹ An example of the latter kind would be: "You saw him strike the plaintiff?" in an action for assault and battery. The fact being material, and embodied in the question, admits an answer either in the affirmative or negative, and should not be allowed. So, on the trial of an action for slander, it is not competent to read to the witness the words as laid in the declaration, and then interrogate him concerning them; for the reason that the plaintiff thus makes known to the witness the very facts which the form of the declaration required to be shown.² And an interrogatory which refers a witness to a previous deposition by him in the same cause, and asks him if his answers therein were true, is leading and inadmissible.³

§ 227. **Leading Questions sometimes admissible.**— A leading question may be allowed in certain circumstances, as to introduce some collateral matter, to assist a faulty recollection of a witness, or in case of a witness who is hostile to the party calling him.⁴ Thus, where a witness required to give the names of persons composing a firm was unable to do so, it was allowed to suggest the name to him.⁵

¹ *Page v. Parker*, 40 N. H. 47; *People v. Mather*, 4 Wend. 229; *Snyder v. Snyder*, 6 Binn. 483; *Parkin v. Moon*, 7 C. & P. 408; *Taylor on Evid.* § 1262a. See, for a full discussion as to leading questions, *Wilson v. McCullough*, 23 Penn. St. 440, and *Spear v. Richardson*, 37 N. H. 23.

² *Osborn v. Forshee*, 22 Mich. 209.

³ *Trammell v. McDade*, 29 Tex. 360. The question, "Do you recollect whether or not, &c. anything was said on the subject of," &c., was held to be leading. *Lewis v. Palmer*, 28 N. Y. 271.

⁴ *Nicholls v. Dowding*, 1 Stark. 81; *Bowman v. Bowman*, 2 M. & Rob. 501; *Bank of North. Lib. v. Davis*, 6 W. & Serg. 285; *Towns v. Alford*, 2 Ala. 378; *Adams v. Harrold*, 29 Ind. 198.

⁵ *Acerro v. Petroni*, 1 Stark. 100. See, further, on this head, 1 Greenl. on Evid. § 435.

When and under what circumstances a leading question may be put is largely in the discretion of the court.¹

§ 228. **Must not ask for Opinion or Belief.** — As a witness is to give his own knowledge of the facts, as they were, or as they exist in reality, he cannot give any *opinion* or *belief* in respect to them; that is a mere conclusion and lies within the province of the jury.² So, when a witness testifying in respect to the alleged admissions of another, is unable to give the words, language, or the substance of it, he should not testify at all; he cannot be permitted to give a mere conclusion of his own when the conversation or declarations from which the conclusion is drawn, have passed from his mind.³ A witness whose only knowledge of another's signature has been derived from an examination of official documents in official custody, purporting to be signed by such other, may give his opinion as to the genuineness of such person's signature to a paper offered in evidence.⁴

The exception to this rule is the case of experts when called to give testimony, whose opinion as far as concerns their art, trade, or profession, is received, to be weighed by the jury according to the experience and reputation of the person called to give evidence.⁵ But such a witness cannot be asked his opinion respecting the very point which the jury are to determine. As whether a particular act, for which a prisoner is tried, be an act of insanity.⁶ This would be assuming the fact as well as the conclusion. We sometimes find the question put in a hypothetical form, that is assuming the existence of certain facts, and then requiring an opinion on them.⁷

§ 229. **A Witness may refer to Memoranda.** — It is a well established rule that a witness may refer to a writing,

¹ *Moody v. Rowell*, 17 Pick. 498; *Black v. Camden & Amboy R. R. Co.* 45 Barb. 40.

² *Taylor on Evid.* § 1271; *Largan v. Central R. R. Co.* 40 Cal. 272; *Cannell v. Phoenix Ins. Co.* 59 Me. 582; *State v. Pike*, 49 N. H. 399; *Adams v. Funk*, 53 Ill. 219.

³ *Helm v. Cantrell*, 59 Ill. 525; *Clark v. Bigelow*, 4 Shepl. 246.

⁴ *Sill v. Reese*, 47 Cal. 294.

⁵ 1 Greenl. Evid. § 440.

⁶ *McNaghlen's case*, 10 Cl. & Fin. 200.

⁷ *Rex v. Wright, R. & R.* 456; *Sills v. Brown*, 9 C. & P. 601.

memorandum, or entry in a book, to refresh his recollection; but the writing or memorandum must have been made contemporaneously with the event, or at most very close to it.¹ And he may be required to refer to such writing if in court, the better to assist his recollection. Before reference can be made to such writing, it must appear that it was made *by the witness himself*, or by some other *in his presence*, at or near to the time the event occurred.² So also when the witness recollects that he saw the paper while the facts were fresh in his memory, and he then knew that the particulars therein expressed were consistent with the facts.³

Whether the witness can refresh his memory by referring to a mere *copy* of his original memorandum is not quite settled in England.⁴ In this country it is permitted, provided that after inspecting it he can speak to the facts from his own recollection.⁵

§ 230. **Use of Memoranda on Lord Gordon's Trial.** — In the trial of Lord George Gordon, Erskine made very effective use of the fact of a witness for the prosecution having made a memorandum of an event, and referring to it on the trial.

The witness, Hay, when cross-examined by Mr., afterwards Lord Kenyon, testified:

K. "Then you cannot speak with certainty?"

A. "Unless I look at some notes I cannot tell; I have some notes here."

K. "Did you make them at the time?"

A. "Yes; I generally made them that evening."

Court. "You may refresh your memory with them."

K. How came you first to take notes?"

A. "I never go to any public meeting but I have an errand; I wished to learn what those gentlemen would be at. I put down then what occurred, and then entered it down after I came home."

¹ Reed v. Boardman, 20 Pick. 441; Chute v. State, 19 Minn. 271; Burrough v. Martin, 2 Campb. 112.

² Duch. of Kingston's case, 20 How. St. Tr. 619.

³ Burton v. Plummer, 2 A. & El. 343; Downer v. Rowell, 24 Vt. 343; Seavy v. Dearborn, 19 N. H. 351; Webster v. Clark, 10 Fost. 245.

⁴ Taylor on Evid. § 1265.

⁵ 1 Greenl. on Evid. § 436; Chicago, &c. R. R. Co. v. Adler, 56 Ill. 344; Filkins v. Baker, 6 Lans. 516.

K. "That is your constant course in all occurrences of life?"

A. "Yes."

K. "Can you tell us any occurrence of your life, where you have committed to writing everything that passed?"

A. "I do not know any one meeting of that kind but I have put down as much as my memory would help me to."

The witness was further pressed to tell on what other occasion he had ever taken notes in a similar manner, and at last answered:

"The first notes I made in my life were in the General Assembly of the Church of Scotland, the very first church I was ever in in my life."

K. "How long is that ago?"

A. "Twenty-two years ago."

Mr. Erskine, in his admirable speech for the defence, seized upon this circumstance, and in a most effective way commented on it to the jury. The speech on this occasion is regarded as one of Erskine's greatest efforts. Speaking of the witness, he said: "William Hay — a bankrupt in fortune he acknowledges himself to be, and I am afraid he is a bankrupt in *conscience*." Referring to his taking notes: "But *why* did he take notes? He said it was because he foresaw what would happen. How fortunate the crown is, gentlemen, to have such friends to collect evidence by anticipation! When did he begin to take notes? He said on the 21st February. . . . Mr. Kenyon, who now saw him bewildered in a maze of falsehood, and suspecting his notes to be a villainous fabrication to give the show of correctness to his evidence, attacked him with a shrewdness for which he was wholly unprepared. You remember the witness had said that he always took notes when he attended any meetings where he expected their deliberations might be attended with dangerous consequences. 'Give me one instance,' says Kenyon, 'in the whole course of your life, where you ever took notes before?' Poor Mr. Hay was thunderstruck; the sweat ran down his face, and his countenance bespoke despair — not recollection. 'Sir, I must have an instance; tell me when and where?' Gentlemen, it was too late; *some* instance he was obliged to give, and as it was evident to everybody that he had one still to

choose, I think he might have chosen a better one. *He had taken notes at the General Assembly of the Church of Scotland six and twenty years before.* What! did he apprehend dangerous consequences from the deliberations of the grave elders of the kirk? Were *they* levying war against the king?"¹

§ 231. A Party cannot impeach his own Witness. — Greenleaf says: "When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces, and having thus presented them to the court, *the law will not permit the party afterwards to impeach their general reputation* for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief. For this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him."²

This rule, however, does not prevent a party calling other witnesses to prove the first to be mistaken, or even to contradict him. This is evidently a just exception to the rule, as otherwise a party would be at the mercy of a witness secretly inimical to him, and whom he may be obliged to call.³

Thus, in New York it is held that there is no exception to the rule, that a party cannot impeach his own witness. As far as he can go is to show the witness to be mistaken, or that the facts are different from the version the witness gives of them.⁴

The rule prohibits a contradiction only when it is attempted for the mere purpose of impeaching the party's own witness, or where the matter sought to be contradicted is collateral only.⁵

¹ See 21 How. St. Tr. for the proceedings at length.

² 1 Evid. § 442.

³ *Wright v. Beckett*, 1 M. & Rob. 414; *Brown v. Bellows*, 4 Pick. 179. A late case in England holds the doctrine very clearly. *Melhuish v. Collier*, 15 Q. B. 878. It is further regulated there by statute of 1854, called "The Common Law Procedure Act."

⁴ *Sisson v. Conger*, 1 Thomp. & C. 564; *Williams v. Sargent*, 46 N. Y. 481.

⁵ *Bok v. Vincent*, 12 Abb. Pr. 137.

§ 232. **Cross-examination.**—It is on the cross-examination that counsel are permitted to indulge in the widest latitude in confounding, discrediting, perplexing, and impeaching a witness. The law attaches great importance to the effect of cross-examination to elicit truth or expose falsehood. The two great means for this purpose are an oath and the liberty of cross-examination. So that if a witness having been examined in chief, should die before an opportunity was given to cross-examine him, his evidence cannot be received.¹

The exceeding indulgence given to counsel in cross-examination has been many times condemned, but this reproach was more deserved formerly than it is now. It was too often the practice to assail a witness as stupid, corrupt, untrustworthy, or wilfully ignorant. So great was the abuse, and so trying was the ordeal of a cross-examination, that even the most accomplished and reliable shrank from it, especially if conducted by a counsel of great reputation.² Perhaps the grossest abuse of the liberty of an examination occurred on the trial of Raleigh, when Sir Edward Coke assailed the eminent but unhappy prisoner in the severest manner. Coke having previously observed to the court that he knew with whom he had to deal—that he had “to deal to-day with a man of wit”—turned himself to Raleigh, and said, “Thou art the most vile and execrable traitor that ever lived.”

¹ *Kissam v. Forrest*, 25 Wend. 651; *Cole v. People*, 43 N. Y. 508.

² A remarkable example of this is given by Phillips in his work on Curran and his Contemporaries, in relation to the dread of Chief Justice Bushe, of Ireland, to pass the ordeal of a cross-examination by Lord Brougham. The author says: “Never shall I forget the state of nervous excitement into which he worked himself, on being summoned to give evidence before the Irish Committee in the House of Lords, in 1839. I think I see him at this moment, as I saw him then, hawking his carpet-bag full of documents up and down the corridors, now walking himself out of breath, now pausing to recover it, now eying the bag on which he much counted, and again gazing about in absolute bewilderment. At last in much perturbation, he exclaimed: ‘The character of a witness is new to me, Phillips. I am familiar with nothing here. The matter on which I come is most important. I need all my self-possession; and yet I protest to you I have only one idea, and that is, *Lord Brougham cross-examining me.*’” Page 443, 4th ed.

Another instance in point occurred recently in the trial of the case of *Tilton v. Beecher*. In the cross-examination of the defendant by Mr. Fullerton, the plaintiff’s counsel, who has a deserved reputation as a cross-examiner, the counsel found fault with the hesitancy of the distinguished defendant in not answering his questions more freely and directly, and the reply was made: “*I am afraid of you.*” See this cross-examination in *Abbott’s Report* of the trial.

Raleigh. "You speak indiscreetly, barbarously, and unciv-
illy."

Coke. "I want words sufficiently to express thy viperous
treason."

Raleigh. "I think you want words indeed, for you have
spoken one thing half a dozen times."

Coke. "Thou art an odious fellow; thy name is hateful to
all the realm of England for thy pride."

Raleigh. "It will go near to prove a measuring cast be-
tween you and me, Mr. Attorney."

Coke. "Well, I will now make it appear to the world that
there never lived a viler viper upon the face of the earth than
thou. Thou art a monster; thou hast an English face, but a
Spanish heart. Thou viper! for I *thou*¹ thee, thou traitor!
Have I angered you?"²

§ 233. *Opinion of Whately in respect to.* — In his *Anno-*
tations on Bacon's Essay on Judicature, Archbishop Whately
expresses the following opinion on the cross-examination of a
witness:

"I think that the kind of skill by which the cross-examiner
succeeds in alarming, misleading, or bewildering an honest
witness, may be characterized as the most, or one of the most,
base and depraved of all possible employments of intellectual
power. Nor is it by any means the most effective way of elic-
iting truth. The mode best adapted for attaining this object
is, I am convinced, quite different from that by which an
honest, simple-minded witness is most easily baffled and con-
fused. . . . Generally speaking, a quiet, gentle, and straight-
forward, though full and careful examination, will be the most
adapted to elicit truth; and the manœuvres and the brow-
beating which are the best adapted to confuse an honest, sim-

¹ This implied that Coke was addressing Raleigh in the most contemptuous
manner he could adopt. It is supposed that Shakespeare alludes to this when he
makes Sir Toby in giving directions to Sir Andrew for his challenge to Viola
say, "If thou *thous't* him some thrice, it may not be amiss." See *Twelfth Night*.

² Disraeli, in his *Curiosities of Literature*, gives the dialogue as given in the
text, which is somewhat fuller, but not essentially different from that given in the
second volume of Howell's *State Trials*. He adds the remark: "This great law-
yer perhaps set the example of that style of raillery and invective at our bar
which the egotism and craven insolence of some of our lawyers include in their
practice at the bar." *Curiosities of Literature*, vol. 3, p. 300.

ple-minded witness, are just what the dishonest one is best prepared for. The more the storm blusters, the more carefully he wraps round him the cloak which a warm sunshine will often induce him to throw off.”¹

§ 234. Object of Cross-examination. — The principal aim of a cross-examination is to affect the witness' credit with the jury. To this purpose the witness is questioned as to his relation to the parties in the cause; his motives, inclination, or prejudice; his character, experience, or observation; his opportunities for discernment, examination, or knowledge; his powers of memory and judgment, — in fine, in such a manner as to impress the jury with an idea of his demeanor, his credit, and character, in order to estimate the value of his testimony.²

¹ “The practice of browbeating witnesses and vituperating the opposite parties in a cause is, as I have before stated, carried to a most unseemly length in our courts of law. I have often wondered that the presiding judges should sit silently on the bench while so scandalous a scene is passing before their eyes. In the case of the parties who are vituperated there is no redress. They are not allowed to defend themselves in court, nor can they, however coarse and libellous the attack, proceed by an action at law against their long-robed traducer. It is, therefore, to say the least on the subject, unmanly on the part of counsel to go out of their way to vituperate and villify parties whose mouths are shut, and whose hands are tied; and it is wrong in the presiding judge to suffer such unbecoming things to be done in court. As regards the browbeating of witnesses, there can be no question that instead of promoting the ends of justice, such a course often defeats them.” Foss, Mem. Westm. Hall, vol. 2, p. 233.

² Mr. Cox, the author of a work entitled *The Advocate, his Training, Practice, Rights, and Duties*, points out *three* objects to be attained in cross-examination: 1. To destroy or weaken the force of the testimony given in favor of the other side. 2. To elicit some evidence favorable to the cross-examiner's own side; and 3. To discredit the witness. He recommends an advocate to be silent, if he cannot pursue an examination with one of these objects in view.

To succeed in effecting any of these purposes, there must be an understanding of the temperament and disposition of the witness. When one may not show that a witness' testimony is false, yet he may succeed by his cross-examination in getting from the witness *explanatory* facts that weaken the force, or materially modify the testimony he first gave. He may be asked to repeat the details again; the examiner now and again suggesting inquiries as to certain other facts, which very likely will be *then* given. “In the same manner you may carry him to the conclusion of his story, and what with the explanation of one fact, an addition to another, and a *toning* down of the color of the whole, the evidence will usually appear in a very different aspect, after a judicious cross-examination, from that which it wore at the close of the examination in chief.” And with reference to a witness who is guarded, it is recommended: “You must wear an open brow and assume a kindly tone. Let there be in your language no sound of suspicion. Intimate

It is, therefore, frequently the habit of a counsel in cross-examination to put trivial and unimportant questions to a witness about some independent collateral matters, in order to show the witness' recollection, his mental capacity, or his judgment and experience. Hence, a witness for the crown in a prosecution was asked the apparently trivial question as to a superstitious story about a bewitched hare which he was in the habit of relating, in order to affect his credit by suggesting his mental incapacity. He was asked the question: "Do you remember anything about the story of a hare; perhaps you may think it odd you should be asked that question?"¹ In this manner was the subject broached.

In another case of high treason a witness for the crown was interrogated about different masters he had lived with, a quarrel he had with one of them, and about different visits he had paid to his aunts; these things having nothing to do with the trial, except for the purpose of inferring that because the witness' memory was weak on these points, it was not likely he could remember, as according to his evidence he did, a speech he had heard at a political meeting.²

§ 235. Rules as to this Examination. — As counsel are

to him delicately your confidence that he is desirous of telling the truth, and the whole truth. Be careful not to frighten him by point-blank questions going at once to involve him in a contradiction, or he will see your design, and thwart it by a resolute adhesion to his first assertion. You must approach the object under cover, opening with some questions that relate to other matter, and then gradually coming round to the desired point." It is not an easy matter to elicit from a witness something favorable to an adversary's side. Ten chances to one, he will still further confirm his former testimony, which is generally done by an indiscreet examination. The great object of an examiner is to *discredit* a witness. This may be done in many ways, by his own testimony or that of others. When by his own, it may be effected by inquiring into the *sources* of his information, the probability of his narrative, or the contradiction in his testimony. A good example of the discrediting a witness is where a woman in a bastardy case, when questioned as to the time and occasion of intercourse, answered: "You say you walked in the garden with Mr. M.?" "Yes." "Before your connection with him?" "Yes." "More than once?" "Yes, several times." "Did you do so afterwards?" "No." "Never once?" "No." "Is there fruit in the garden?" "Yes." "I suppose you were not allowed to pick any?" "Oh! yes; he used to give me some." "What fruit?" "Currants and raspberries." "Ripe?" "Yes." This was in May, and it was shown there could be no fruit of the kind ripe at that time.

¹ Crossfield's Trial (taken by Gurney), p. 120.

² Hardy's Trial, vol. 2, pp. 227, 240.

not so circumscribed in their questions in cross-examination, as in the examination in chief, there is not the same necessity of formal rules as in the direct examination. The rule is to allow a large degree of license to the examining counsel, who will therefore use his own discretion and ingenuity as to his line of questioning. There are, however, limits to this latitude, well established and recognized. In later years we do not permit counsel to worry, villify, and impugn a witness, which was so prominent a feature of a cross-examination in former times. "Give him fair play," said Lord Chief Justice Eyre to Erskine, when, on Hardy's trial, he was worrying the witness Alexander.¹

Before inquiring as to the limits of a cross-examination, we will first allude to some well-sanctioned modes of inquiry, not enunciated as formal rules by courts, but observed on many occasions by distinguished advocates, and therefore well worthy of consideration as precedents.

§ 236. Questions as to Motives or Interest. — In the examination of a witness, there is no fact so frequently sought to be proved as some interest or motive in a witness. Hence, in cross-examination, a counsel will use every endeavor to bring this before the jury in order to present the witness in the light of an interested party, either from having already received some compensation for his testimony, or from an expectation of a reward therefor.² An instance of this was in the examination of the witnesses in the trial of Queen Caroline, where this line of inquiry was pursued with remarkable

¹ Vol. 2, p. 239. The following are judicious remarks on this head: "Except in the case of a dishonest witness, one prepared to trifle with his oath, a witness may justly put in, and stand on a right to receive courteous, or at least inoffensive, treatment at the hands of his examiner. In his character of witness he is a servant of justice; by the sacredness of an oath he binds himself to speak the truth; and while he fulfils the duty so imposed on him, he is entitled to the respect which, by the usage of society, the observance of any duty commands and receives." *Ram on Facts*, p. 221, Am. ed. That the Attic orators indulged in virulent abuse of their adversaries to a far greater extent than would be permitted, in modern times is shown by Forsyth in his interesting work *Hortensius*, p. 51.

² A witness may be interrogated as to his interest in the result of the trial in order to let the jury judge of the credit due to his testimony. *Suit v. Bonnell*, 33 Wis. 180; *Vaughan v. Westover*, 4 Thomp. & C. (N. Y.) 316; *Lefler v. Field*, 50 Barb. 407.

success, and gave Lord Brougham the opportunity to comment as follows: "They were all willing witnesses — some of them had already received much. A part of them were influenced by actual acceptance — a part by the hope that the gratitude of those who summoned them would operate greatly to their advantage: they were, therefore, zealous in the behalf of their employers; and, of course, they would not have stopped short at mere confirmation, if by any means they could have carried the case through."¹ Thus, on cross-examination, the witness Vincenzo Gargiulo, was asked:²

"Have you made any bargain with any person as to the sum you are to have?" "Yes, I have."

He then detailed at length the arrangement by which he was to receive a thousand dollars a month as a compensation for quitting a vessel he owned, trading in the Mediterranean.

"Have you received any money in advance, or is this sum you speak of in expectancy?" "I have received one month."

"If you are understood right, you left the vessel actually performing a voyage?" "I left my ship, which had sailed from Manfredonia to go to Reggio, where she was going to discharge her cargo; after having arrived here I have learned that my captain has sold the cargo at less per bushel than the first cost."

Counsel. "Perhaps, you have made a more profitable voyage here."

Lord Brougham with admirable effect commented on the evidence of this witness: "If one royal person gave him so much, and if that was nothing compared to the uncertain allowances to be made to him, how much less would her illustrious husband and his servants be limited to £2,400 a year, if he pleased them — if he fully made out the case — if the case should come well through his hands, and no accident befell him in giving his testimony. If he should succeed in this, he must get what would make a mere joke of the £2,400 a year."³

¹ Trial of Queen Caroline, vol. 2, p. 25.

² See vol. 1, p. 305.

³ A more recent illustration of this style of examination occurred in the trial of Tilton v. Beecher, when the witness, Moulton, was cross-examined by Mr.

The same line of examination was pursued with the witness Louisa Demont, one of the leading witnesses for the prosecution. This witness was more adroit than some of the others examined, and it was with some difficulty the cross-examination on this point succeeded: She was asked: "Have you finally agreed what you are to have for your evidence?" "They have promised nothing for my evidence." "Have you not asked for anything before you came, or for any promise, before you came over to this country, upon your oath?" "No."

"Or anything else for your personal presence?" "No, I have only demanded that they should pay the expenses of my journey." "Do you mean to swear that you expect nothing for coming to this country, and for giving your evidence?" "I expect nothing at all for having come here." "No benefit, or any profit of any kind, you mean to swear?" "I expect no profit for coming here."

"You do not believe, upon your oath, that you are to receive any money, or benefit of any kind for coming to England?" "I expect no advantage from coming here, only that they should pay my expenses back to Switzerland, nothing more." "That is all you expect?" "Yes, that is what I expect." "And that is all you believe you are to get?" "I expect nothing else." "You believe you shall have nothing else?" "I do not believe that I shall have anything more."¹

§ 237. Questions as to Recollection. — It is sometimes a suspicious circumstance when a witness exhibits a ready rec-

Evarts; the latter in a most searching manner questioned the witness as to his interest in the cause, his connection with the plaintiff in certain pecuniary transactions. The same style was observed in the brilliant examination of the defendant by Mr. Fullerton, one of the plaintiff's counsel.

¹ It will be observed how the counsel reiterated his questions to this witness, but obtained no further admission than that she expected her expenses to be paid back to Switzerland. It may be questioned, whether it were the wisest course to continue to ask, and thus give her the opportunity to make her denials more emphatic. Cicero had a good rule in such a situation: "It is my duty as counsel to put a question or two, and that briefly, to a witness when examining to any particular fact, and often to abstain from putting any questions at all, less I should give an adverse witness an opportunity of damaging my case, or seem to put leading questions to a willing one." Forsyth's *Hortensius*, p. 127.

ollection of matters to which he is called to testify, and fails to call to mind others, happening about the same time, and having some connection with such matters. Counsel make effective use of this fact in a cross-examination, to discredit the testimony of a witness. In a recent celebrated trial, the curious have enumerated the number of times two of the principal witnesses have used the expressions, "I don't remember," or "I cannot recollect."¹ But the witness who attracted the most attention for this want of recollection was the celebrated Majocchi, in the trial of Queen Caroline. The expression so repeatedly and persistently used by this witness, "*Non mi ricordo*," gave a preëminence to him in that celebrated case, and gave Brougham the finest opportunity to use his sarcasm with telling effect for the defence. The cross-examination of this witness — the principal one in support of the charge — is looked upon as the most successful ever conducted. Manifesting the readiest memory in answers as to the matters alleged against the queen, he was hopelessly and lamentably forgetful as to other occurrences necessarily related to these matters, and repeatedly and monotonously came the reply "*Non mi ricordo*," "I don't remember." It would not be practicable to give in a short space a fair specimen of this examination, but an enumeration of some points in Lord Brougham's great speech² will convey an idea as to its effect. Speaking of this witness he said: "That witness had distinguished himself during this trial by an expression equally brief and to him more useful; that one sentence appeared to comprise the practical result of all the wisdom and all the experience which he had accumulated in the study of his art; and as long as the words 'I don't remember,' which he used in the practice of that art, in which he evinced great skill — so long as those words were known in the English language, the image of Majocchi, without the man being named, would forthwith arise in the imagination." . . . "He (Mr. Brougham) only asked their lordships to contrast with the minute recollection of rooms, doors, and corridors, the circumstance

¹ In the cross-examination of the defendant and Moulton, in *Tilton v. Beecher*.

² Lord Denham, an associate of Brougham on this trial, says in reference to this effort, it was "one of the most powerful orations that ever proceeded from human lips." Foss, *Mem. West. Hall*, vol. 2, p. 257.

of Majocchi not having the slightest recollection of a whole new wing added to the house in which her majesty had lived. This showed the dishonest character of the whole testimony. Of the same nature was his evidence when any calculation of time was required. He observed the most trifling distinction of time when that suited his purpose, and he recollected nothing of time when it was inconvenient for his object." "But there was one part of Majocchi's evidence upon which he would rest as gross and palpable perjury. It was so gross and palpable as to dispense with the necessity of pointing out perjury in other instances. He denied that he had been dismissed by her royal highness; but said he had left her service because of the bad people that were about her. This he said with the double purpose of raising his own character, and debasing the queen's. But he would show this to be false from his own mouth. When asked whether he had not made application to get back, his answer was, 'I don't recollect.' 'Did you apply to Count Schiavini to be taken back?' 'I did.' The moment he mentioned that, his assertion that he did not recollect failed; therefore, to save himself, he told them all — and very material it was for their lordship's consideration — 'Yes, yes (*così, così*), I did apply to Schiavini, but it was in joke.' Now their lordships would mark that. The former answers were probable, if this was in joke, if not, they were positive perjury. If, then, this was in joke, what followed he would have at once answered by 'No.' 'Did you apply to several persons? did you apply to Hieronymus?' '*Non mi ricordo.*' This last answer was gross and wilful perjury. He cared not which. The joke, in fact, was an invention to protect the other invention, or the story was perfectly incredible that he applied in joke to Schiavini, and that he did not recollect whether he applied to others."¹

§ 238. Questions concise and rapid. — Some able advocates adopt the practice of putting sharp, concise, and rapid questions where a witness manifests an evident reluctance to be full or explicit in his answers, — where he is evidently subtle and guarded. An approved authority² points out this

¹ Vol. 2, pp. 25-34.

² Alison, *Prac. of Cr. L.* 546. Quoted by Greenleaf and Taylor in their works on evidence.

as the most effectual way to deal with a witness of this description. He says: "The most effectual method is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony which it is desired to overturn. It frequently happens that, in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied or but partially admitted before."¹

§ 239. *Leading Questions allowed.* — In this examination

¹ This is also the recommendation of Lord Bacon; in his Essay on Cunning, he says: "A sudden, bold, and unexpected question doth many times surprise a man and lay him open. Like to him that having changed his name, and walking in Paul's, another suddenly came behind him, and called him his true name, whereat straightways he looked back." On many occasions this method has succeeded (as mentioned in the text) in obtaining additional admissions where only a partial admission was made before; but too often an unskilful examiner may bring out confirmatory evidence in his cross-examination, and thus strengthen his opponent's side. This happened on the trial of the Earl of Thanet and others in 1799 for a riot in court caused by the attempted escape of Mr. O'Connor. The witness, Parker, was examined thus:

Examination in Chief.

- Q. "Did you see Lord Thanet?"
 A. "I did."
 Q. "What was he doing?"
 A. "Lord Thanet evidently appeared to me to be obstructing the officers in their attempt to stop Mr. O'Connor."

Cross-examination.

- Q. "You say Lord Thanet appeared to you to be obstructing the officers; did you see him do anything?"
 A. "I saw him resisting with his hands."
 Q. "What did he do with his hands?"
 A. "The Bow Street officers pushed forward; and against one of them it was that he was making resistance."
 Q. "Pray which of them?"
 A. "I cannot tell. I do not know which. I did not know either of them."
 Q. "Can you tell whether it was against either of those two men or against the Messenger that he was making that resistance?"
 A. "I cannot."
 Q. "But you saw him put his hand against one man that was coming forward?"
 A. "Yes, certainly."

it is permitted to put leading questions to an adverse witness.¹ This is often necessary to obtain any satisfactory answers from an unwilling witness. However, the liberty does not go so far as to permit the counsel to put the very words into the mouth of the witness;² nor can an examiner base his question on an assumption that particular facts have been proved which have not.³ This, of course, is a general rule, applicable to all examinations. The allowance of leading questions in cross-examination may be denied where a witness is manifestly friendly to the side cross-examining him. It would often be unjust to permit a witness who may be unfriendly to the side calling him, covertly or openly to answer leading questions on a cross-examination. It was held in *Moody v. Rowell*,⁴ that the court in its discretion may prohibit leading questions from being put to an adversary's witness, who shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to his cause.⁵

§ 240. **Browbeating Witnesses.** — The reproach of cross-examination for a long time, was the custom, often indulged and too often tolerated, of "browbeating" adverse witnesses. This practice has drawn the censure of many of our own best writers; but happily it is not a reproach so much deserved now as formerly. It is rarely indulged in except by the indiscreet and inexperienced; the able advocate, except under extreme provocation, will always refrain from it.

In Bentham's *Work on Judicial Evidence*, he devotes a chapter to this subject,⁶ and condemns the practice as tending to defeat the ends of justice. He says: "Even in the *course* of the examination, and after having received whatever war-

¹ Taylor on Evid. § 1288.

² *Rex v. Hardy*, 24 How. St. Tr. 659.

³ Taylor on Evid. § 1288.

⁴ 17 Pick. 498. See *People v. Russell*, 46 Cal. 121.

⁵ Best on Evidence, § 641, says: "The rule is that on material points a party must not lead his own witnesses, but may lead those of his adversary; in other words, that leading questions are allowed in cross-examination, but not in examination in chief. This seems based on two reasons. First, and principally, on the supposition that the witness has a bias in favor of the party bringing him forward and hostile to his opponent."

⁶ Vol. 2, p. 80, edition by Mill.

rant it is capable of receiving from whatever symptoms of mendacity may have transpired, it seems to be neither necessary, nor (in comparison of such unobjectionable resources as have just been mentioned) preferably conducive to the purposes of truth and justice. At the *outset* of the adverse examination, and therefore before this style of demeanor can have received any warrant (at least in the eyes of either the judge or any person besides the advocate himself who is displaying it), it seems adverse to the interests of truth and justice; and that in more ways than one."

"In the sort of treatment thus given to a witness, two distinguishable injuries may commonly be seen united: the imputation of guilt cast upon the witness in the way of assumption, frequently without any ground at all, and always without the justification afforded by antecedently apparent grounds; this unwarranted imputation, coupled with the assumption of a sort of magisterial authority over the witness by the advocate."

He then points out how imperative is the duty of a judge to check such conduct in an advocate. "In the presence of the judge any misbehavior, which being witnessed at the time by the judge, is regarded by him without censure, becomes in effect the act, the misbehavior of the judge. On him more particularly should the reproach of it lie."¹

§ 241. Restriction on Cross-examination. — The brow-

¹ In respect to the demeanor of a counsel to adverse witnesses, it is laid down by Mr. Cox, that "there are two styles of examination, which we may term the *savage* style and the *smiling* style. The aim of the *savage* style is to *terrify* the witness into telling the truth; the aim of the *smiling* style is to *win* him to a confession. The former is by far the most frequently in use, but its use is a great mistake. The passions rouse the passions. Anger, real or assumed, kindles anger. An attack stimulates to defiance. By showing suspicion of a witness you insult his self-love — you make him your enemy at once — you arm his resolution to resist you — to defy you — to tell you no more than he is obliged to tell — to defeat you if he can. Undoubtedly there are cases where such a tone is called for, where it is politic as well as just, but they are *rare*, so rare that they should be deemed entirely exceptional. In every part of an advocate's career, good temper and self-command are essential qualifications, but in none more so than in the practice of cross-examination. It is marvellous how much may be accomplished with the most difficult witness simply by good humor and a smile; a *tone* of friendliness will often succeed in obtaining a reply which has been obstinately denied to a surly aspect and a threatening or reproachful voice."

beating, confounding, and vilification of witnesses by counsel in cross-examination is rarely observed in our courts at the present time, and whenever attempted is promptly checked by the presiding judge. This is one of the marked improvements in judicial proceedings; litigation is less acrimonious and personal than formerly, and more respect and courtesy are observed towards parties and witnesses.

With all the license allowed in cross-examination, there are, nevertheless, bounds which counsel cannot exceed without a check, even without error, for a breach of the rules established will sometimes be sufficient to order a new trial. There is a wholesome maxim long current in the law, but too often lost sight of in the examination of witnesses — "*nemo tenetur seipsum accusare*" — no one is bound to accuse himself; and yet another — "*nemo tenetur prodere seipsum*" — no man is bound to betray himself. Adopting the principle of these maxims, certain questions tending to the disgrace and infamy of the witness are not allowed to be put and answered by him, or if put need not be answered. And a witness who is subject to any unnecessary severe treatment or opprobrious language, can always appeal to the court, who will interfere promptly and decidedly.

§ 241a. Questions tending to disgrace the Witness. — Questions that have a tendency to show to the jury the general character of the witness, as evidenced by a former charge of crime, or imputation of guilt or degradation, are sometimes put. For a long time this was a subject of much controversy, and the decisions were much divided in reference to the propriety or impropriety of such questioning, where the answers tended to degrade the witness.¹

The position now generally accepted in regard to this matter is, that if the fact inquired into be relevant to the issue, the witness must answer, and if falsely, the fact can be proved by other evidence to impeach his character; but where the matter is irrelevant, an answer by the witness will be conclusive, and no proof can be offered to impeach him.² It is said

¹ Phillips in his Evid. vol. 2, p. 422, sums up the arguments for and against the right to have such questions answered.

² Rex v. Watson, 2 Stark. R. 149; People v. Mather, 4 Wend. 250; 1 Greenl. on Evid. § 454.

"the difficulty lies in determining with precision the materiality and relevancy of the question, when it goes to the character of the witness. There is certainly great force in the argument, that where a man's liberty, or his life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted."¹ This question will lie wholly in the discretion of the judge at the trial, who will decide on the relevancy and materiality of the question from his observation of the witness, the course of the examination, and the nature of the case.²

But to justify a refusal, the answer must directly tend to his infamy; it will not do that it may indirectly produce that result; it must be obvious and certain.³

On the trial it was sought to impeach a witness by showing that she was a prostitute; this was refused by the court. On appeal it was held that as it appeared from the evidence that the witness was a person of that character, there was no error in the refusal; but this decision implies that where the fact was not apparent, it should have been allowed to be shown to the jury.⁴

§ 242. **As to a Conviction for Crime.** — Where there has been in fact a previous conviction for a crime, the question ought not to be permitted if a witness has been convicted, as better evidence, the record of the conviction, can be offered to impeach the witness. This is now the usual way to impeach a witness on this head — either to show by documentary evidence a commitment for crime in execution of sentence, or on a preliminary charge.⁵ But if a witness, on cross-examination,

¹ 1 Greenl. on Evid. § 455.

² It is an elementary rule, that the limit of cross-examination is within the discretion of the judge. *Plato v. Kelly*, 16 Abb. Pr. 188; *Great West. Co. v. Loomis*, 32 N. Y. 127.

³ *Parkhurst v. Lowten*, 1 Meriv. 400; *State v. Patterson*, 2 Ired. 346.

⁴ *People v. Reed*, 48 Cal. 553. See *Commonwealth v. Billings*, 97 Mass. 405; *Paulette v. Brown*, 40 Mo. 52; *People v. Robles*, 34 Cal. 591. The witness, on the ground of his answer tending to disgrace, him may refuse to answer, but this fact will often be presented against him to the jury. 1 Stark. on Evid. 172.

⁵ *Newcomb v. Griswold*, 24 N. Y. 298; *Peck v. Yorks*, 47 Barb. 131; *People v. Herrick*, 13 Johns. 84; *Clement v. Brooks*, 13 N. H. 92; *Rex v. Edwards*, 4 T. R. 440; *Tift v. Moore*, 59 Barb. 619.

is asked if he was not arrested for vagrancy, an objection that the record is the best evidence is not tenable; for an arrest does not necessarily imply that there was any record.¹ The New York decisions have made a distinction in respect to these questions to a witness. They hold that where the question inquires as to a *conviction for a certain crime*, the record is the competent evidence of this fact; but a witness may be asked if he has been *imprisoned, and how long*, with the view of *impeaching his testimony*.²

§ 243. Questions applying Opprobrious Titles.— Questions are not allowed to be put to a witness conveying a title that may be disgraceful. This falls under the rule that a witness ought not to be compelled to answer questions involving his own infamy or disgrace.³ Thus, it has been decided to be improper to call for an answer from a witness admitting him to have taken the character of a spy, which is considered an objectionable appellation. This happened on the trial of Hardy, when Erskine, in cross-examining a witness, said: "Then in plain English you went there as a spy?" This question passed unheeded at the time, but in a subsequent part of the trial, when Erskine applied the same reproachful word to another witness, the expression was thus objected to:

Erskine. "What date have you taken, good Mr. Spy?"

Lord C. J. Eyre. "These observations are more proper when you come to address the jury."

Atty. General (Sir John Scott). "Really that is not a proper way to examine a witness. Lord Holt held strong language to such sort of an address from a counsel to a witness who avowed himself a spy."⁴

The question was brought up and decided recently on the

¹ *People v. Manning*, 48 Cal. 335. See *Brandon v. People*, 42 N. Y. 265.

² *Real v. People*, 42 N. Y. 270. The manner of proving a conviction, in order to impeach a witness, is laid down in England by statute 28 & 29 Vict. c. 18, which permits a witness to be questioned on the point, and in case of denial allows the record of the conviction to be introduced to impeach him.

³ In the celebrated case of *Thellwall v. Yelverton*, which involved the issue whether Miss Longworth was the wife of Major Yelverton, she styled herself Mrs. Yelverton; but on the trial, in her cross-examination, one of the counsel addressed her as Miss Longworth, and when she objected, the court required him to address her by the title of Mrs. Yelverton.

⁴ 2 Hardy's Trial, 335.

trial of Bernard in England, when the counsel for the defence asked:

Q. "Did you go there as a spy?"

A. "I went by the direction of the Commissioners of Police to attend a public meeting there."

Q. "What did you go there for?"

A. "To take notes of who were there, and what was said."

Q. "You went there as a spy, did n't you?"

Atty. General. "It would be fairer for the witness, as well as to those who sent him, if you were to ask what his instructions were."

Q. "Well, what were your instructions? Did you go as a spy?"

Chief Justice (Lord Campbell). "You had better get the facts from him, and you can draw any inference you please."

Counsel. "It is a plain English question, and I submit that I may ask it."

After some further argument the question was submitted to the judges, and it was held by the court: "The question being objected to, I am of opinion that it is irregular — not on the ground that the witness is called on to criminate himself and may refuse to answer; but on the ground that he is called upon to draw an inference from the facts. It will be open to Mr. James (the counsel) to denominate the witness as a spy hereafter, if he think fit; but I am of opinion that he cannot ask the witness, 'Now did you go as a spy?'"¹

§ 244. Questions involving admission of crime or liability, are not required to be answered, because no man is held to produce evidence against himself. The decisions on this point are clear and certain, that a witness cannot be required to answer when his answer would subject him to a prosecution for a crime, or admit a liability in a penal action.²

It will be the duty of the court to interfere when necessary to protect witnesses, but it will not instruct them beforehand that they are not bound to criminate themselves, if not so requested.³

¹ London Times, April 14, 1858.

² Paxton v. Douglass, 19 Ves. 225; Rex v. Slaney, 5 C. & P. 213; Southard v. Rexford, 6 Cow. 254; 1 Burr's Trial, 245; State v. Davidson, 67 N. C. 119.

³ U. S. v. Darnaud, 3 Wall. Jr. 143, 179; Close v. Olney, 1 Denio, 319.

So, it is improper to ask a female witness—even with a view to impeach her upon her statement that she has been twice married, and that her first husband is dead—whether she did not marry her last husband before the death of the first.¹ And when the profession of a certain religion was followed by penal consequences, it was held that a person ought not to be required to answer that he belonged to such religious body.²

Whether a witness can refuse to answer, when his answer may subject him to a *civil action*, was for a long time undetermined, until a statute was passed in England³ compelling a witness to answer as to a matter relevant to the issue, even if his answer exposed him to the liability on a civil action; and this act is regarded here as declaratory of the law.⁴

But a witness is not obliged to answer when his answer will subject him to a *forfeiture of his estate*.⁵

In an action for libel against Cardinal Wiseman in England, the defendant sought to avail himself of the rule that a witness is not bound to criminate himself. It was proposed to swear the distinguished defendant himself as a witness; to which it was objected, that under the rule no evidence pertinent to the issue could be extracted from him. The judge erroneously ruled that the cardinal need not be sworn; this ruling was reversed on appeal, when it was held that the privilege of the rule could not be extended to this case.⁶

§ 245. Questions on irrelevant matters, not directly connected with the subject in issue, may be asked on a cross-examination for many purposes to test the memory of the witness, his experience or judgment. But there is no rule better established than that a witness examined on a collateral matter, outside of the issue, cannot be contradicted or impeached thereon. The propriety and reason of this rule are obvious. If it were allowed to examine into the truth of other matters besides the facts in issue, a trial might be in-

¹ *Forney v. Ferrell*, 4 W. Va. 729.

² *Rex v. Friend*, 13 How. St. Tr. 16-18.

³ 46 Geo. III. c. 37.

⁴ 1 Greenleaf on Evid. § 452, and cases cited.

⁵ *Rex v. Woburn*, 10 East, 395; *People v. Irving*, 1 Wend. 20.

⁶ *Boyle v. Wiseman*, 10 Exch. 647.

terminably prolonged; and again, one cannot be supposed to be ready to support the truth of a fact to which he is not directly called to give evidence.¹ So, if inquiries be made on such collateral matters the answers given thereto must be taken as conclusive, and cannot be contradicted by other evidence.² And where a witness was asked on cross-examination, and for the sole purpose of affecting his credit, whether he had not made false representations of the adverse party's responsibility, his negative answer was held conclusive against the party cross-examining.³

An error in permitting a witness to be contradicted on a collateral inquiry was one of the reasons for granting a new trial in the case of Stokes charged with the murder of Fisk in New York, and probably saved the defendant from capital punishment. A young girl, a witness for the prisoner, was asked in cross-examination, if she did not, when discharged from her former employment, take with her things that did not belong to her; and the prosecution was then permitted to give evidence to show her answer untrue. This was held to be error.⁴

§ 246. *Refusing to answer on the Ground of Privilege.* — It is well known that there are some classes of persons privileged to refuse answering certain questions. It is the policy of the law to maintain the confidence and security of certain relations between parties, and therefore answers that tend to violate this confidential relation may be denied. Such relations are those of husband and wife, attorney and client, and the pastoral relation. It is a well settled rule that all professional communications are inviolate in this respect, and where the relation has actually existed a witness cannot be called

¹ Taylor on Evid. § 1292; 1 Stark. on Evid. 164; Geary v. People, 22 Mich. 220; Rosenweig v. People, 6 Lans. 462; State v. Elliott, 68 N. C. 124; Hildeburn v. Curran, 65 Penn. St. 59.

² Baker v. Baker, 32 L. J., Pr. & Mat. 145; Tennant v. Hamilton, 7 Cl. & Fin. 122; Ware v. Ware, 8 Greenl. 42; Lawrence v. Barker, 5 Wend. 301; Commonwealth v. Buzzell, 16 Pick. 157; Harris v. Wilson, 7 Wend. 57; Carpenter v. Ward, 30 N. Y. 243; Atwood v. Welton, 7 Conn. 66; United States v. Dickenson, 2 McLean, 325; Ortiz v. Jewett, 23 Ala. 662; Griffith v. Eshelman, 4 Watts & 1; Stevens v. Beach, 12 Vt. 585; Rosenbaum v. State, 33 Ala. 354.

³ Howard v. City, &c. Co. 4 Denio, 502.

⁴ 53 N. Y. 164.

to give evidence as to such matters.¹ It makes no matter whether the inquiry be in relation to matters already commenced, or those about to be commenced, in a professional capacity—all are equally privileged. Lord Brougham lays down the rule: "This protection is not qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, . . . they are not only justified in withholding such matters, but *bound to withhold them*, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness."²

A question has often arisen as to whether, after the married relation is dissolved, communications between the former husband and wife can be given in evidence. But Lord Alvanley emphatically condemned any encroachment on the rule, remarking: "It never can be endured that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved."³

The same rule would be observed here.⁴

In England it is held, "Neither penitential confessions made to the minister, or to the members of the party's own church, nor even secrets confided to a Roman Catholic priest in the course of confession, are regarded as privileged communications."⁵ This doctrine is not held here to this extent, as we esteem such communications from a penitent to his pastor *under the rules of his church*, confidential and entitled to protection, and statutes have been passed in many of our States giving this privilege.⁶

¹ The cases on this head are so well settled, and so numerous, it is only considered necessary to refer to leading authorities on evidence where the rule is stated. See Taylor on Evid. §§ 829-866; 1 Greenleaf's Evid. "Privileged Communications."

² Greenough v. Gaskell, 1 Myl. & K. 103.

³ Monroe v. Twisleton, Pea. Add. Cas. 221.

⁴ 1 Greenl. on Evid. § 236.

⁵ Taylor on Evid. § 838.

⁶ See 1 Greenl. Evid. § 248; People v. Gates, 13 Wend. 311.

§ 247. *The Limit of Cross-examination lies in the Discretion of the Court to a Great Extent.* — It will, therefore, interfere to stop irrelevant questions, check abuses of manner, waste of time, or a desultory line of examination.¹ A decision in New York has held very approved and decided views in regard to the power in a court to control questions in cross-examination. Where it was claimed for counsel a license in this respect, it was said: "The practical effect of such a rule would be to make every witness dependent on the forbearance of adverse counsel, for that protection from personal indignity which has been hitherto secured from the courts, unless the circumstances of the particular case made collateral inquiries appropriate. . . . It may well be questioned whether, even in our courts of record, it would be safe or wise to withdraw the control of irrelevant inquiry from the judge, and commit it to the discretion of adverse counsel. The interposition of the court has often been necessary to protect witnesses from the rigor of examinations conducted on the supposition they were entitled to such protection."²

¹ *People v. Ah Who*, 49 Cal. 32; *Varona v. Socarras*, 8 Abb. Pr. 302; *Woodin v. People*, 1 Park. Cr. 464; *State v. McCartney*, 17 Minn. 76; *Wroe v. State*, 20 Ohio N. S. 460; *Hay v. Douglas*, 8 Abb. Pr. N. S. 217. It is in the discretion of the court to confine a cross-examination within reasonable limits, and when protracted to an unreasonable extent, the court may prohibit its continuance. *Reed v. Clark*, 47 Cal. 194; *McGinnis v. Kempsey*, 27 Mich. 363; *Rosser v. McCally*, 9 Ind. 587.

² *Great Western Co. v. Loomis*, 32 N. Y. 132. In the case of *Thurtell v. Beaumont*, 1 Bingham, 339, a remarkable scene happened, when Justice Parke, exercising his judicial discretion, interfered to check the counsel for putting an improper question. The following colloquy took place in reference to the interference. It is found fully reported in *Foss' Mem. of West. Hall*, vol. 1, p. 176. Mr. Serjeant Taddy, in examining a witness, asked him a question about something that had happened "after the plaintiff had disappeared from that neighborhood." Thereupon the presiding judge, Parke, observed: "That is an improper question, and ought not to have been put." — *Serj. Taddy*. "That is an imputation to which I will not submit. I am incapable of putting an improper question to any witness." — *Justice Parke*. "What imputation, sir? I desire you will not charge me with casting imputations. I say the question was not properly put, for the expression 'to disappear' means 'to leave clandestinely.'" — *Serj. Taddy*. "I say it means no such thing." — *Justice Parke*. "I hope I have some understanding left, and so far as that goes, the word certainly bore that interpretation, and was, therefore, improper." — *Serj. Taddy*. "I never will submit to a rebuke of this kind." — *Justice Parke*. "This is a very improper manner, sir, for a counsel to address the bench in." — *Serj. Taddy*. "And this is a very improper manner for a judge to address counsel in." — *Justice Parke*. "I protest, sir, you will compel me to do what is very disagreeable to me" (*rising with warmth*). — *Serj.*

III. IN ARGUMENT.

§ 248. The privilege of argument by counsel is not only sanctioned by long and well-established precedent, but is guaranteed by strict constitutional law. As representing a party, a counsel is thus recognized as constituting an element — and a very important one — in judicial investigation. His right to participate in behalf of his client, in the examination of witnesses, and in argument to the jury, is as fully assured as is the right of the other component parts — the judge and the jury — in their separate spheres.¹ Not only is this right thus completely assured; it is also given with the greatest possible indulgence and immunity; for in its exercise privileges are conferred, and a license and degree of irresponsibility allowed, limited in great measure only by conscientious regards of a counsel in the discharge of his duties.² Thus privileged, it is

Taddy. "Do what you like, my lord!" (*with equal warmth*). — *Justice Parke* (*resuming his seat*). "Well, I hope I shall manifest the indulgence of a Christian judge." — *Serj. Taddy*. "You may exercise your indulgence or your power in any way your lordship's discretion may suggest, it is a matter of perfect indifference to me." — *Justice Parke*. "I have the functions of a judge to discharge, and in doing so, I must not be reprov'd in this kind of way." — *Serj. Taddy*. "And I have a duty to discharge as counsel, which I shall discharge as I think proper, without submitting to a rebuke from any quarter."

¹ A party to a suit is not compelled to employ counsel to conduct it, but has the constitutional right to appear in *propria persona*. *May v. Williams*, 17 Ala. 23.

² The place and the duty of counsel in judicial proceedings were well expressed by the court in *Garrison v. Wilcoxson*, 11 Geo. 154. There was an assignment of error because the court below charged the jury that in determining the question they were not "to look to the argument of counsel." — In regard to this the court stated: "In a very significant sense they must *look* to the argument of counsel. Parties have a right to appear by counsel, and it is the privilege of counsel to address the jury on the facts. If the jury are to disregard the argument of counsel altogether — if they are to shut their ears to their illustrations, comments, and reasonings, how unmeaning, indeed, how absurd is the appearance of counsel. It is a most valuable right to be represented by learned and eloquent counsel, not only before the court as to the law, but also before the jury as to the facts. . . . The true view of the position of counsel before the jury, is that of aids or helps. They are officers of the court — amenable to its authority, subject to its correction, and restrained by usages of honor and courtesy, which, however in some instances disregarded, are as ancient in their origin, and as potent for good, and as generally respected, as any usages which belong to any class of the highest grade of civilized man. The duties of the advocate are among the most elevated functions of humanity. . . . It is the business of the jury to listen, to be informed, but not to obey."

not surprising, under the excitements of the occasion, and under the strife of antagonism, there would be too often exhibited abuses of invective, acrimony in argument, and injustice to opponents.¹

§ 249. **Argument under Control of Court.**— While the right of a counsel is thus recognized, and this degree of indulgence allowed, it is at the same time to be borne in mind that the right must be exercised under the control and direction of the court, which is intrusted with the power and duty of regulating the order of the proceedings; the determination of the question as to what shall be admitted in argument to the jury outside of the facts brought out in evidence; the degree of invective to which a counsel can go,² and the time during which the argument shall continue. It is sometimes difficult to adjust their respective spheres so that counsel be not restrained or denied his true privileges, nor the court transcend the legitimate exercise of its authority. A memorable conflict of this kind took place on the trial of the Dean of St. Asaph, for libel, before Justice Buller, when Erskine exhibited rare courage and spirit.

In spite of the instruction of the judge that they were to find only on the question of publishing, the jury found a verdict of "*guilty of publishing only*." The following scene then took place:

Erskine. "You find him guilty of publishing only?"

A juror. "Guilty only of publishing."

Buller. "I believe that is a verdict not quite correct. You must explain that one way or other. The indictment has stated that G. means Gentleman; F. Farmer; the King, the king of Great Britain."

A juror. "We have no doubt about that."

Buller. "If you find him guilty of publishing you must not say the word 'only.'"

Erskine. "By that they mean to find there was no sedition."

¹ Sir Alexander Cockburne declared that "the arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his client *per fas*, but not *per nefas*." Alb. L. Journal, vol. 12, p. 369.

² The determination of the trial court whether counsel transcend the limits of professional propriety in invective, cannot be assigned for error in the appellate court. *State v. Hamilton*, 55 Mo. 520. See *State v. Waltham*, 48 Mo. 55.

Juror. "We only find him guilty of publishing; we do not find anything else."

Erskine. "I beg your lordship's pardon; with great submission, I am sure I mean nothing that is irregular. I understand them to say they only find him guilty of publishing."

Juror. "Certainly; that is what we do find."

Buller. "If you only attend to what is said, there is no question or doubt."

Erskine. "Gentlemen, I desire to know whether you mean the word 'only' to stand in your verdict?"

Jurymen. "Certainly."

Buller. "Gentlemen, if you add the word 'only' it will be negating the innuendoes."

Erskine. "I desire your lordship, sitting here as judge, to record the verdict as given by the jury."

Buller. "You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment."

Juror. "Certainly."

Erskine. "Is the word 'only' to stand part of the verdict?"

Juror. "Certainly."

Erskine. "Then I insist it shall be recorded."

Buller. "Then the verdict must be misunderstood; let me understand the jury."

Erskine. "The jury do understand their verdict."

Buller. "Sir, I will not be interrupted."

Erskine. "I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded."

Buller. "Sit down, sir, remember your duty or I shall be obliged to proceed in another manner."

Erskine. "Your lordship may proceed in what manner you think fit; I know my duty as well as your lordship knows yours. I shall not alter my conduct."¹

The judge did not carry his menace into effect; but the jury added to the verdict, "they did not find whether it was a libel or not." An attempt was made to set the verdict aside, but Erskine in a magnificent speech defeated it. The spirit manifested by the eminent counsel on this occasion aroused

¹ See Trial of Dean of St. Asaph, 21 How. St. Tr. 847.

public interest, and Fox soon after carried through parliament his libel bill, which settled the rights of juries in libel cases.

§ 250. *Argument to be confined to the Evidence.*— There is no rule so likely to be violated as that which confines a counsel to the facts of the case. It frequently happens that a counsel in many ways, by illustration, hypothetical statements, and rhetorical ingenuity, will seek to bring before the jury matters not warranted by the evidence. It is held to be the strict duty of the court to check any departure from the evidence, and to stop counsel when he introduces irrelevant matters, or facts not supported by the evidence.¹

And if the objection be made to this course of argument, it is error for the court to permit it, and a new trial will be granted;² but where counsel for the State made comments outside of the evidence, and no objection was made, it was held to be no error.³

A court may properly refuse to allow the plaintiff's counsel to argue a case before the jury, when there is no evidence in the cause legally sufficient from which they could legitimately find a verdict for the plaintiff.⁴

There are occasions when the court should not wait for the objection of the opposite party, when a counsel commits a flagrant breach of the rule, as where a counsel attempts surreptitiously to get before the jury facts which have not been proven,⁵ and where an attorney, in arguing his cause on his own account, gave an account of an attempt by a person not a party to the record to assassinate him.⁶

But where there is a conflict of testimony, it is not error for the court to permit counsel to state to the jury the facts as proved according to his view of the case.⁷

In the exercise of this power to control counsel, and to stop

¹ *Dickerson v. Burke*, 25 Geo. 225; *Doster v. Brown*, *Ibid.* 24; *Bullock v. Smith*, 15 *Ibid.* 395; *Cook v. Ritter*, 4 E. D. Smith (N. Y.), 253; *Loyd v. Hannibal*, &c. R. R. Co. 53 Mo. 509.

² *Tucker v. Henniker*, 41 N. H. 317.

³ *Davis v. State*, 33 Geo. 98.

⁴ *Bankard v. Baltimore*, &c. R. R. Co. 34 Md. 197.

⁵ *Berry v. State*, 10 Geo. 511.

⁶ *Saunders v. Baxter*, 6 Heisk. 369.

⁷ *Hotcher v. State*, 18 Geo. 460; *McNab v. Lockhart*, *Ibid.* 495.

and correct him when the purport of the evidence is mistaken, a court should not express its opinion on the facts of the case.¹

The boundaries that separate legitimate argument by illustration from an attempt to covertly introduce facts bearing on the case unconnected with the evidence, are not always easily determined. It is a question that must be decided on many occasions by the discretion of the court. It was said in reference to this: that, "concerning the closing argument of the counsel for the plaintiff, it is to be observed, that an advocate, however unrestricted he may or ought to be, in the use of all the forms of rhetoric, such as invective, satire, ridicule, or humor, and every variety of illustration drawn from the facts in evidence, or from facts hypothetically assumed, ought not to be allowed to make himself a witness, and state facts within his own knowledge touching the case under discussion."²

§ 251. *Reading Authorities in Argument.* — It is frequently the habit of counsel to read extracts from authorities to the jury; and many times the practice has been criticised or denied. There are sometimes occasions when a court may rightfully deny this privilege. As where a counsel proposed to read to the jury an adjudication by the highest court of another State ruling that a statute similar to that upon which the indictment is founded is contrary to the constitution of that State.³ The true rule was perhaps stated in a recent Texas case, where it is said that the practice of allowing counsel to read authorities to the court in the presence of the jury during the progress of a trial, is subject to the discretion of the court, and no inflexible rule as to allowing or limiting the privilege can be prescribed. The court may refuse to allow an unnecessary consumption of time.⁴

The general rule is to permit extracts from text-books to be read in argument by way of illustration merely, but the court should instruct the jury that such extracts are not evidence;

¹ *Bill v. People*, 14 Ill. 432. It is error to permit counsel to read and comment upon, as part of his argument to the jury, the minutes of the evidence taken at a former trial between the same parties. *Martin v. Orudorf*, 22 Iowa, 504.

² *Loyd v. Hannibal, &c.*, R. R. Co. 53 Mo. 514.

³ *Commonwealth v. Murphy*, 10 Gray, 1; *Commonwealth v. Porter*, 10 Met. 263.

⁴ *Mayfield v. Cotton*, 37 Tex. 229.

and when it deems the doctrine erroneous, to so inform the jury.¹ In regard to the practice, it is said in a California case, that "the practice of allowing counsel in either a civil or a criminal action to read law to the jury, is objectionable, and ought not to be tolerated. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases or extracts from text-books, subject to the sound discretion of the court, whose duty it is to check, promptly, any effort on the part of counsel to disregard the instructions, or to take the law of the case from the books rather than from the court."²

§ 252. **Comments on Persons and their Acts.** — There is no part of a counsel's argument liable to so much abuse as that wherein he animadvert upon parties, witnesses, or others in connection with the case. The immunity which a counsel enjoys is too often made use of in unsparing and indiscreet attacks upon those who stand opposed to him in any way. But while persons may meritoriously deserve reprobation where their conduct is confessedly open to censure, and it may be the duty of a counsel to hold them up in their true light before the jury, an honorable counsel will rarely step aside from the legitimate purpose of his argument to make severe personal attacks upon the parties, their witnesses, or others, in connection with the case; and whenever this is done, a court fails in its duty to suffer it to pass unrebuked. So a judge has power to stop an attorney who abuses his privilege in commenting on a witness and his testimony. This power is usually exercised sparingly; but it should be exercised promptly and firmly when the abuse is gross.³

And where a counsel commented on a prisoner not giving evidence in his own behalf, it was held error for the court to allow it, and a new trial was granted.⁴

Also when a defendant in a criminal case has not produced

¹ *Harvey v. State*, 40 Ind. 516; *Yoe v. People*, 49 Ill. 410; *Cory v. Silcox*, 6 Ind. 39; *Kenyon v. Sutherland*, 3 Gilm. (Ill.) 99; *Legg v. Drake*, 1 Ohio N. S. 286.

² *People v. Anderson*, 44 Cal. 65. See *Fuller v. Talbot*, 23 Ill. 357; *Sprague v. Craig*, 51 Ill. 288.

³ *State v. Williams*, 65 N. C. 505; *Jenkins v. Ore Dressing Co.* Ibid. 563.

⁴ *Crandall v. People*, 2 Lans. 309.

any evidence to sustain his general reputation and moral character, it is improper for counsel to argue to the jury that his failure to do so may be considered against him.¹

But certain acts of a party tending to show bad faith, and dishonest dealing on his part, are properly the subjects of comment to the jury; as where a defendant being asked if he had not disposed of his property to avoid a recovery in the action, and had not since attempted to sell the same property, it was held proper to comment on his answers to the jury.² And the non-introduction of a settlement on which it is relied that a note, the subject of the action, was brought into account and satisfied, is a proper circumstance for comment before the jury, on the trial for the recovery of the amount of the note.³

§ 253. *Argument on the Law.* — Whether an argument on the law of the case can be made to the jury is very much doubted. It ought not to be permitted when the court is asked for a statement of the law, and gives it to the jury as authoritative.⁴ And the court may rightly prevent the counsel for the defence from arguing the constitutionality of a law to the jury.⁵

It is very common in argument for counsel to present his views of the law to the jury; but this must be subject to a correction afterwards when the court gives instructions to the jury.⁶ Nevertheless, a court can always interfere and stop a counsel in an argument of law to the jury, when its own opinion is fixed; and in that case, it may refuse to allow any argument.⁷

Where the jury are invested with the power to decide the law as well as the facts, (as they are in some of our States

¹ *Fletcher v. State*, 49 Ind. 124.

² *State v. Lassiter*, 70 N. C. 462.

³ *Chambers v. Brigman*, 68 N. C. 274. See *Gray v. Burk*, 19 Tex. 228; *Cross v. Garrett*, 35 Iowa, 480.

⁴ *Davenport v. Commonwealth*, 1 Leigh, 588; *Delaplane v. Crenshaw*, 15 Gratt. 457.

⁵ *Franklin v. State*, 12 Md. 236.

⁶ *Robinson v. Adkins*, 19 Geo. 398.

⁷ *Howell v. Commonwealth*, 5 Gratt. 664.

by statute), it will, therefore, be permissible to address the jury both on the law and the facts.¹

§ 254. *Limiting Time of Argument.*— That there is some limit in point of time to the argument of counsel, must be taken for granted. There must be in the courts some power to regulate the time a counsel shall take up in his address to jury; and yet this power must be circumscribed; otherwise it might be so exercised as to abridge the right very considerably. It is the frequent practice of the courts to prescribe in civil cases, and in criminal trials for minor offences, the length of time a counsel shall take up in argument, and the exercise of this discretion is supported.² Thus, in a slander case, the court limited the argument to one hour and a half on the part of the plaintiff, and one hour on the part of the defendant, and it was held on appeal on the part of the plaintiff that this was no abuse of the discretion of the court.³

But the question is more seriously presented in trials for grave offences, or in matters involving complex interests, and great conflict of evidence. There, it is evident, the discretion of the court might be used so as to cause an injury to either of the parties. For as it is a constitutional right to have counsel argue to the jury, it may well be maintained that an abridgment of the right is an infringement of the constitution.

So, it was held in a case where a defendant was on trial for an assault with intent to murder, and his counsel was limited to forty minutes in his argument to the jury, that it was error thus to limit him under his protest that he could not do justice to his client in that space of time.⁴ The same was held in a California case. The defendant was tried for a capital

¹ In the trial of Colonel Lilburne, in 1649, he strenuously insisted on addressing the jury on the law, saying to the judges, "You that call yourselves judges of the law are no more but Norman intruders, and in deed and in truth, if the jury please, are no more but ciphers to pronounce their verdict," to which Justice Jermin exclaimed, "Was there ever such a damnable blasphemous heresy as this is, to call the judges of the law ciphers." See 4 How. St. Trials.

² *Dobbins v. Oswalt*, 20 Ark. 619; *Freligh v. Amca*, 31 Mo. 253; *State v. Page*, 21 Mo. 257; *Lynch v. State*, 9 Ind. 541; *Wood's case*, 7 Leigh, 743.

³ *Musselman v. Pratt*, 44 Ind. 126.

⁴ *Hunt v. State*, 49 Geo. 255. In a trial for shooting with intent to kill, a limitation of the argument for the defence to five hours was sustained. *Weaver v. State*, 24 Ohio N. S. 584.

offence, and his counsel was restricted in his argument to one hour and a half. The court held this limitation improper, as it deprived the prisoner of the opportunity of a full defence, which was his constitutional right.¹

In view of these decisions it is hard to consent to the authority of a late case in North Carolina, where the same limitation as to time was placed on the counsel's argument in case of trial for murder. There it was held to be no error to limit the counsel to one hour and a half.²

§ 255. *Responsibility of Counsel in Argument.* — As far as pertinent to the issue, a counsel is privileged to comment upon individuals without being liable in an action; but when a counsel uses this opportunity to go outside of the case and make a slanderous attack upon a party, he is then no more privileged than any other person, and must be held liable.³

Thus, an attorney, in defending his client from a charge of assault in turning out the plaintiff from certain premises in which he had agreed to sell wine under agreement with a certain party, stated that that party had sufficient reasons for determining the agreement; that he had been plundered by the plaintiff to a frightful extent. This was held to be privileged.⁴ And where a party was alleged to have kept a sum of money, which by his contract he ought not to have kept, counsel referring to this matter used the language, "This gentleman has defrauded us," and was interrupted by the court before he had finished his sentence. It was held, first, that the words were not actionable; secondly, that they were not irrelevant to the matter before the court.⁵

NOTE. — The danger of a counsel employed for the prosecution presenting facts of his own invention is illustrated in a case as described by the counsel himself

¹ *People v. Keenan*, 13 Cal. 581.

² *State v. Collins*, 70 N. C. 241. The refusal of the court to permit counsel to proceed in addressing the jury is not error, unless excepted to. *Wilkins v. Anderson*, 11 Penn. St. 399.

³ Words spoken or written in a legal proceeding, pertinent and material to the controversy, are privileged. *Garr v. Selden*, 4 N. Y. 91; *Lea v. White*, 4 Sneed, 111; *Jennings v. Paine*, 4 Wis. 358; *Parker v. Mitchell*, 31 Barb. 469; *Hoar v. Wood*, 3 Met. 193; *Hodgson v. Scarlett*, 1 B. & A. 232; *McMillan v. Birch*, 1 Binn. 178, per Tilgham, C. J. See *Brook v. Montague*, Cro. Jac. 90.

⁴ *Mackey v. Ford*, 5 Hurl. & N. 792.

⁵ *Needham v. Dowling*, 15 L. Jour. C. P. 9.

(Sir Jonas Barrington, *Personal Sketches*, vol. 1, p. 365). He thus relates the history of the case: "Mr. K. had been accused of a capital crime by a Miss B., who stated that she had gone away with him for the purpose, and in the strict confidence of being married the same day. The grand jury, on the young woman's testimony, found a true bill against him for the capital offence, and he came to Carlow to take his trial at the assizes. He immediately called upon me with a brief, — said it was a mere bagatelle, and totally unfounded, and that his acquittal would be a matter of course. I had been retained against him. He made so light of the business, that he told me to get up a famous speech against him, as no doubt I was instructed to do; that indeed I could not say too much, as the whole would appear, *on her own confession*, to be a conspiracy! On reading my brief, I found that, truly, the case was not over strong against him even there where in all probability circumstances would be exaggerated; and that it rested almost exclusively on the lady's own evidence; hence, I had little doubt that, upon cross-examination, the prisoner would be acquitted. The trial proceeded; I was then rather young at the bar, and determined, for my own sake, to make an interesting and affecting speech for my client; and having no doubt of K.'s acquittal, I certainly overcharged my statement, and added some *facts* solely from invention. My surprise, then, may be estimated, when I heard Miss B. swear positively to *every syllable* of my emblazonment. I should now have found myself most painfully circumstanced, but that I had no doubt she *must* be altogether discredited. In fact, she was quite shaken by the cross-examination of the prisoner's counsel. I left the court as the jury retired. In about an hour I received an account that K. had been found *guilty*, and sent back to gaol under sentence of death! I was thunder-struck, and without delay wrote to the chief secretary in Dublin, begging him instantly to represent to the lord lieutenant the real facts; execution was in consequence respited. I waited on the lord lieutenant, stated precisely the particulars I have here given, and my satisfaction (even from my own brief) that the girl was perjured." The end of it was, that the lord chancellor recommended the sentence to be changed to transportation for life, and K. was accordingly so transported.

CHAPTER VII.

QUESTIONS OF LAW AND OF FACT.

PART I. GENERALLY CONSIDERED.

- § 256. Necessity of Distinction.
- § 257. Law evolved from Facts.
- § 258. Facts — their Nature.
- § 259. Facts — Classification.
- § 260. Questions of Law and Fact distinguished.
- § 261. Questions of Law.
- § 262. Questions of Fact.
- § 263. Cause of Mistake in relation to.
- § 264. Advantage of the Distinction.

PART II. WHERE INTENT IS A MAIN ELEMENT.

- § 265. Intent generally.
- § 266. Questions of Fraud.
- § 267. Fraud in regard to Chattel Mortgages.
- § 268. In Sale of Property.
- § 269. Other Instances of Fraud.
- § 270. Malice.
- § 271. Probable Cause.

PART III. WHERE EFFECT IS MOST CONSIDERED.

- § 272. Effect of certain Acts or Omissions.
- § 273. Authority.
- § 274. As to its Existence.
- § 275. As to its Extent.
- § 276. Ratification.
- § 277. Insurance.
- § 278. Powers of Agents.
- § 279. Abandonment.
- § 280. Concealment.
- § 281. Misrepresentation.
- § 282. Questions as to Notice.
- § 283. Other Cases in respect to.
- § 284. Knowledge and Notice.
- § 285. Notice through Printed Labels or Receipts.
- § 286. Reasonable Time.
- § 287. Reasonable Time, when a Question of Law.
- § 288. Reasonable Time, when a Question of Fact.

- § 289. Possession.
- § 290. Sale and Delivery.
- § 291. A Delivery and Acceptance.
- § 292. Payment.
- § 293. Usury.
- § 294. Negligence.
- § 295. When a Question of mixed Law and Fact.
- § 296. When a Question of Law.
- § 297. In Cases of Contributory Negligence.
- § 298. When a Question of Fact.
- § 299. Necessaries.

PART IV. WRITTEN INSTRUMENTS.

- § 300. Their Effect.
- § 301. When a Question of Fact.
- § 302. In reference to Contracts especially.
- § 303. The Validity of a Contract.
- § 304. The Performance of a Contract.
- § 305. Boundaries of Land.
- § 306. Questions of Title.

PART I. GENERALLY CONSIDERED.

§ 256. *Necessity of Distinction.* — The subjects with which legal proceedings are concerned are laws and facts — laws as predicated upon and applied to certain facts either as assumed or evolved by proof. As these two subjects are in their nature distinct, and are generally submitted to different forums for adjudication, it is, therefore, a matter of exceeding importance to have them distinguished in the course of legal investigation, so as to have some *criteria* by which we can determine what is a question of law and what a question of fact. This is still more desirable when we consider how many errors are committed, and verdicts set aside, because of a mistaken decision on these questions in the course of a trial by a jury.

If there cannot be a test or definition by which a distinction can be made, we must expect to find these matters involved in confusion; and, moreover, we can never hope to keep within the province and function of the jury, that which rightfully belongs to it, or limit the court to its appropriate sphere. The importance of the distinction was pointed out by Lord Hardwicke when he said: "It is of the greatest consequence to the law of England, and the subject, that the powers of the judge and jury be kept distinct; that the judge determine the law and the jury the fact; and if ever they become to be con-

founded, it will prove the confusion and the destruction of the law of England.”¹

We shall for the present assume that the proper tribunal for the adjudication of facts is the jury; and for the law, the court; but it is intended to discuss these questions of law and fact, as to their nature and quality, independently of the tribunal deciding them. It is too often the case that a question is set down as one of fact or of law *because* of the tribunal to whose decision it was submitted. But this is erroneous; for the distinction should be grounded on some quality or character antecedently to any disposition of these questions. We should be able *à priori* to ascertain and distinguish them, without any reference to the forum that may have at one time or another decided them.

§ 257. Law evolved from Facts.—Facts must precede law; for law governs them in their relation or effect. In the earliest stages of human events we find but few laws. The sequence and relation of facts have not yet been duly observed, and, therefore, it is not possible to prescribe rules in reference to them. Before this can be done an examination will be necessary as to the recurrence, relation, and sequence of certain facts, when a rule of law may be prescribed. This is precisely the mode by which a law is obtained in other departments besides jurisprudence. Facts need to be observed, classified, and compared, before we can safely lay down a law controlling them.

The most elementary character of a law—found in early stages of human society—is a *prohibitory* one, represented by the command “thou shalt not.” But it is necessary to know what constitutes the act thus forbidden, to determine what combination of circumstances shall be considered as sufficient. This is done by a definition, or a rule of law, which characterizes the act, and points out its constituents. For example, let it be larceny which is forbidden. Here it must be understood what shall constitute the act; what combination of facts shall amount to the forbidden act. It becomes a simple inquiry, then, whether a person committed this act as thus characterized; it is a mere question of fact to determine. But

¹ Rex v. Poole, Cas. tem. Hard. 28.

the person may not commit the act in the precise mode as laid in the definition ; for an act may be committed under many varying circumstances. Suppose, instead of *taking away* the article with him, he merely removes it a short distance out of the reach or dominion of the owner. Does this constitute a taking ? This is then decided as a matter of fact, that an act of this kind does amount to a *taking*, one of the ingredients of larceny. This will be a precedent for other cases in like circumstances ; and hence from this is *evolved a rule of law* to govern in all similar instances. It may be enunciated in some formal way ; as, the removal of any article out of the possession and dominion of the owner is a *taking*, one of the constituents of larceny. Now this is an illustration of the manner in which many rules of law take their rise ; so that what may at one time be a *question of fact*, may, at a future period, be determined by a *rule of law*. We shall need to refer to this principle in the progress of our inquiry in this chapter.

§ 258. *Facts — their Nature.* — Before any discrimination can be made, we must first determine, if possible, what facts are. What do we mean by a question of fact ? If we refer to the lexicographers, we do not obtain a definition that can be practically applied. In the definition there is *one main idea*, which is very characteristic of a fact ; that is, that a fact is something *actual*, as opposed to what is supposititious or imaginative. This idea is better conveyed to our mind by the word than any other. The difficulty is that there are so many things denominated facts, so various in their character, so different in their origin, and so different in their apprehension, that it is not easy to give a comprehensive and yet a definite signification to the term. If certain things are mentioned we can often easily tell whether to class them as facts or not. Thus, the doing of an act, the state or condition of any object or being, the happening of an event, the feeling of an emotion, an effect produced by the operation of the mind, — are all classed under the term. A good enumeration is thus given : “ By fact is here meant, anything that is the subject of testimony, anything that a witness rightly testifies to be a fact. If a thing be perceived by any sense of the body, or faculty of the mind, the perception is a fact. If a thing is seen or heard,

the seeing or hearing of it is a fact. If any emotion of the mind is felt, as joy, grief, anger, the feeling of it is a fact. If the operation of the mind is productive of an effect, as intention, knowledge, skill, the possession of this effect is a fact. If any proposition be true, whatever is affirmed or denied in it is a fact. . . . A fact, once in complete existence, once ended, admits of no addition, no subtraction ; ' nothing can be put to it, nor anything taken from it ; ' once in existence it is irrevocable." ¹

§ 259. **Facts — Classification.** — In reference to legal investigation, there are two divisions of facts. There are *evidentiary* facts ; which are mere steps, or links in the chain of testimony, aiding in the determination of other facts, ultimately determined by means of these subsidiary facts. These ultimate facts are termed *principal* facts, because they are the facts about which the investigation is concerned.² These are rather inferences from those facts given in testimony, and can be ascertained by a rational mind on the ordinary principles of deduction. "By evidentiary facts, I mean such facts as are not competent to form the ground of a decision of themselves, nor otherwise than in as far as they serve to produce in the breast of the judge a persuasion concerning the existence of such and such other facts, of the description just given, viz, principal facts."³

Another division is made into two classes, — *physical* and *psychological* facts. This division is based on the character of the object from which taken ; the physical is considered as having its seat in some inanimate being, and a psychological fact in an animated being. An example of facts possessing these qualities, is in the case of *motion* and *voluntary motion* ; the former, a physical fact, may be connected with an inanimate object ; the latter can only be found in some animate being, and is therefore a psychological fact.⁴

There is another distinction very worthy of note. Facts may be considered either as *events* or *states of things*. We

¹ Ram on Facts, pp. 11, 12.

² 1 Benth. Jud. Evid. 40.

³ Ibid. p. 41.

⁴ Ibid. p. 45 ; Best's Evid. § 12.

speak of the happening of some event, as the fall of a house, the act of a person, which event in this sense is an *action*. The state or condition of an object is a frequent inquiry as a matter of fact. Such as the inquiry, Was there a house there? Was any person present? But if we inquire farther and ask, What did he do? we then inquire for an *event* or an *action*.

§ 260. Questions of Law and of Fact distinguished. —

It can afford but little advantage to define a question of law as one that is appropriately within the cognizance and determination of the court, and a question of fact as one belonging to the province of the jury. We are thus as far off any real inherent distinction as before. Yet definitions of the terms are often given in this manner. So one of our approved writers gives a definition thus: "A question or inference of fact is one which the jury can find upon the evidence by virtue of their own knowledge and experience without any legal aid derived from the court. And an inference or conclusion of law is one which the court can draw from the mere circumstances of the case as ascertained by a jury, independently of any general inference or conclusion drawn by the jury."¹ This is probably the best definition we can find in the books, and yet it is defective, inasmuch as it uses the words "court" and "jury" in the definition, implying what the court *can* decide is a question of law; and one on which the jury *can* pass is a question of fact. This is too much like a *petitio principii*. We still desire to know *why* the jury determine the one, and the court the other? What inherent qualities do they possess which enable us to refer one class of questions to a certain tribunal, and another class to a different one?

We propose to make the distinction in this manner: There are two classes of questions submitted to adjudication in courts of law, namely, those decided according to a rule of law, and those not decided by a rule of law, or according to legal principles.² In the last division, we should include all questions

¹ Stark. Evid. 768.

² Bentham gives a good definition when he says: "The question of the law is decided by the text of the law, or when there is no written law, by previous decisions; the question of fact is decided by the evidence." 1 Jud. Evid. 9.

purely of fact, and those other questions called doubtful, or those sometimes termed "mixed questions of law and fact," but not aptly so designated.¹ First we must ascertain what we mean by a question of law.

§ 261. **Questions of Law.** — Whenever a rule has been promulgated by legislative enactment or enunciated by judicial decision upon any fact or combination of facts, either as giving a certain quality to an act or acts, or as attaching a certain effect thereto, we should designate it a rule of law, and the application of such a rule to any fact or state of facts would be a question of law. As an illustration, suppose it to be inquired whether a person who is a minor can make a valid will. In the statement of the question there is conceded the truth of the fact, that the person is a minor. The conclusion is established as a question of law, because a rule of law exists disqualifying such a person from making a valid will. The statement may be embodied in the form of a syllogism thus: A minor cannot make a valid will; A. B. is a minor; therefore A. B. cannot make a valid will. Hence, a question of law presents to us an inquiry as to the correctness of the major premise of a syllogism; we have to inquire first, when a given fact or state of facts is conceded, if there be a rule or principle of law applicable, before we can decide or draw the inference.

§ 262. **Questions of Fact.** — There is no doubt that the inquiry as to whether a certain thing did or did not exist, whether an act was done or not, presents to us a *question of fact*; but the matter is not often presented in so simple a manner. It more frequently happens that an inference is to be drawn from certain other facts; and then the question is presented, whether this inference is one of law or of fact. We have already stated what can be properly regarded as a question of law; and as a converse from the proposition stated, we should say that whenever it is required to decide upon the

¹ In strictness, therefore, as the legal application of every technical expression recognized by law is partly a matter of fact and partly a matter of law, it may be doubted whether the terms "mixed questions of law and fact" serve accurately to distinguish any particular class of cases. All technical expressions whatsoever, such as asportation, conversion, acceptance, and the like, are in their application partly matters of law, partly matters of fact. Stark. Evid. 779.

relation of one fact to another, upon the effect of an act or acts, or to draw an inference therefrom, when no rule or principle of law governs, and nothing more is necessary than the knowledge possessed by persons of ordinary understanding and observation, the decision or inference is a matter of fact.

Observing these principles, it will be found not so difficult to draw the line so as to distinguish a question of law from one of fact. Ordinarily there is not much difficulty in drawing the distinction; it is in reference only to some questions of a mixed character, verging upon one side as much as the other, that any uncertainty arises. Such are the questions of "intent," "negligence," "reasonableness," "due diligence," "due notice," and such like.

§ 263. **Cause of Mistake in relation to.** — In order to appreciate the distinction, we should be careful to consider that what may, at one time, be considered a question of fact, may, at a subsequent period, become one of law, because a rule or precedent has been established in the interval which governs. This principle may be observed in reference to certain questions, such as negligence, fraud, and diligence; which on some occasions have been considered as questions of fact, but frequent decisions upon certain recurring circumstances connected with them have settled rules of law, which thereafter enable us to treat them as questions of law. What omission of duty will amount to negligence cannot be determined in all circumstances, and therefore it is not practicable to decide by a rule of law; but the duty imposed on a party in certain well known situations may be so obvious, that no doubt can arise as to such duty. For example, where a railroad crosses a thoroughfare, a party should be compelled to give some warning, by ringing a bell, or in some other manner, of the approaching train, and when this obvious duty is neglected, there can be no question in declaring it negligence in law — negligence *per se*. It is evident, however, that there must be numerous situations where we cannot so readily pronounce one guilty of negligence; and it would, in such cases, be impracticable to lay down a rule of law.¹ For this reason, we

¹ In all questions depending upon a general inference from a multiplicity of particular facts, the inference is always one of fact, unless the law has established

find negligence classed as a question of law in some cases, and again as one of fact in others. It is the same in regard to other subjects, which may sometimes be found considered as questions of law, and again as of fact.

§ 264. The advantage of the distinction is, that it gives system and uniformity to our law; it has enabled us to fix upon general rules and principles in our legal decisions which can be usefully and practically applied. If whenever a question of diligence, fraud, or negligence came up for adjudication, it were necessary to decide, as a matter of law, that it did or did not fall within one of this class, we would then have a multitude of decisions varying with every single case, which could never be resolved on any general principle, and which, therefore, would be utterly useless as precedents for other cases. The advantage in our legal system, of being able to decide these questions on some occasions as matters of fact and not as law, is admirably pointed out by Tindal, C. J., when he says: "It is, in truth, a matter of important and obvious policy rather to refer questions of this nature as matters of fact to a jury than to frame legal rules applicable to particulars. The difficulty of framing precise rules must in such instances be very great, unless they be founded on some prominent and decisive incidents; whenever the court decided upon circumstances, the decision would become a precedent and rule of law; and as each decision would afford room for comparison for a great number of distinctions, the obvious effect would be to multiply such decisions and distinctions to a very inconvenient and burdensome extent. . . . And this is an advantage, and by no means an unimportant one, incident to the system of trial by jury; the law can thus deal in general definitions and leave the rest as facts to the jury without multiplying decisions and precedents."¹

PART II. WHERE INTENT IS A MAIN ELEMENT.

§ 265. *Intent generally.*—Intent as a motive in the mind, characterizes many actions; it is a necessary element, on many

some fixed rule, or the inference is one which admits of no doubt. In such cases the court may determine it as they do other cases. *Sessions v. Newport*, 23 Vt. 9

¹ *Mellish v. Rawdon*, 9 Bing. 423; *Shute v. Robbins*, M. & M. 133.

occasions, in the consideration of the legal effect of a person's acts. It thus properly demands our first attention at the beginning of this examination. It is reasonably assumed, as a general rule, that every wilful act of a party had some corresponding intent in the mind; and the existence of that intent is a fact, to be ascertained as a psychological fact by the open and manifest acts of the party. While it may be assumed that the intent existed, it cannot, however, be ascertained as a rule what *particular* intent preceded any given action; if it could, the intent of a party would be simply an inference of law, when we knew his act. As there can be no rule of law established, it is, therefore, a question of fact to ascertain what this intent may have been as inferred from a person's conduct and acts.¹

But there are some occasions when an intent may be safely inferred as a legal conclusion from one's acts. It is found that a certain intent invariably precedes a given act; the law can then prescribe a rule, and this intent is no longer a question of fact. If a man takes up a weapon and wilfully strikes another, it is safe to conclude that he *intends* to injure him, and the law infers this intent from the act.² So the law presumes that one who publishes of another what is defamatory on its face, does so with that malicious intention which constitutes a libel.³

But, in general, intent is a matter of fact to be found by the jury; this is especially the case in criminal prosecutions, where the intent must be inferred by the jury from the evidence. So the intent is to be found by the jury when a child under twelve years of age is forcibly taken from its parents;⁴

¹ Says Grover, J., in *Stokes v. People*, 53 N. Y. 179: "To constitute crime, there must not only be the act but also the criminal intention, and these must concur, the latter being equally essential with the former. *Actus non reum facit, sed meus*, is a maxim of the common law. The intention may be inferred from the act, but this in principle is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court."

² It is not proper to decide, as a question of law, that a "policeman's mace is a dangerous weapon." *Doering v. State*, 49 Ind. 56. See *People v. Saxton*, 22 N. Y. 309, where intent is conclusively inferred from an act.

³ *Underwood v. Parks*, 2 Str. 1200; *King v. Wright*, 8 T. R. 298; *Dexter v. Spear*, 4 Mason, 115; *King v. Root*, 4 Wend. 113; *Commonwealth v. Odell*, 3 Pittab. (Pa.) 449.

⁴ *Oliver v. State*, 17 Ala. 587.

and the intent which animates a person making an arrest.¹ When the facts may or may not constitute larceny, according to the intent of the prisoner, his felonious intent is a question for the jury.²

The principle which should be observed in ascertaining the intent is thus held in Texas: "Intent being a purpose of the mind, is discoverable only through the acts of the person; yet by the acts the intent can in most cases be proved with as much certainty as if it was a thing to be seen and felt; and therefore no person should be punished for an act when the intent forms a material part of the offence, until the intent has been demonstrated beyond a reasonable doubt."³

We shall consider more specially some manifestations and effects of intent, to which the law has given a certain quality, such as fraud and malice.

§ 266. **Questions of Fraud.** — There is a division recognized in questions of fraud; there is what is termed *fraud in law* and *fraud in fact*. Because there are certain transactions which, of themselves and unexplained by other circumstances, will unmistakably manifest a fraudulent intent. So it is stated: "In some cases the fraud is *self-evident*, when it is the province of the court so to adjudge, and the jury have nothing to do with it. In other cases, it depends upon a variety of circumstances, arising from the motive and intent; then it must be left as an open question of fact to the jury. And in other cases there is a presumption of fraud which may be rebutted."⁴ So, it is certain that fraud or fraudulent intent is not always a question of fact. Thus, when a trader alienates the whole of his effects for a past debt, he is guilty of

¹ *Journey v. Sharp*, 4 Jones (N. C.), 165.

² *Ellis v. People*, 21 How. (N. Y.) 356.

³ *Mullins v. State*, 37 Tex. 337. In a question of fraudulent intent it is the peculiar province of the jury to decide as to the sufficiency of the evidence to warrant a verdict. *Oliver v. Chapman*, 15 Tex. 400; *Miller v. Stewart*, 24 Cal. 509. The intent with which a corporation with knowledge that a lease had been made to a partnership for their benefit, and that covenants in it had been assumed for them by the partnership, received an assignment of the lease, and occupied the leased premises, is a question for the jury. *Van Schaick v. Third Av. R. R. Co.* 38 N. Y. 346.

⁴ *Hardy v. Simpson*, 13 Ired. 132. See *Chanery v. Palmer*, 6 Cal. 112; *Billings v. Billings*, 2 Cal. 113.

fraud against his creditors, and commits an act of bankruptcy; and the court will infer fraud from the facts, without the aid of a jury.¹ In *Doe v. Manning*,² Lord Ellenborough says, "Fraud and covin is always a question or judgment of law on facts and intention." But the intention must be ascertained as a question of fact, where the law has made no rule as to inferring the intention from certain facts. What particular facts tend to prove fraud is a question of law,³ and so what will constitute fraud;⁴ but whether these facts are sufficiently proved so as to amount to fraud, must be determined by the jury.⁵

There are certain transactions connected with the sale and mortgage of property from which the law will infer fraud; in some cases the presumption will be conclusive, in others it will be merely *prima facie*. There is a difference of opinion on the nature of the presumption in certain cases: while some maintain it to be conclusive when certain facts are shown to exist, others hold the presumption can be rebutted, and the question of fraud will then be for the jury.⁶

§ 267. Fraud in regard to Chattel Mortgages. — The question, whether an omission to change possession under a chattel mortgage is done with an intent to defraud creditors, is one of fact for the jury;⁷ and possession by the mortgagor, incon-

¹ *Newton v. Chantler*, 7 East, 138; *Wilson v. Day*, 2 Burr. 827; *Siebert v. Spooner*, 1 M. & W. 714; *Estwick v. Caillaud*, 5 T. R. 420. In *Milne v. Henry*, 40 Penn. St. 352, it is stated that fraud in law differs from fraud in fact, in that when certain *indicia* are established, its presence is determinable as a matter of law by the court, regardless of evil intent on the part of those engaged in it; whereas fraud in fact depends upon the fraudulent intent of the parties, and the facts establishing this are for the jury.

² 2 Burr. 937.

³ *Gage v. Parker*, 25 Barb. 145; *Erwin v. Voorhees*, 26 Ibid. 130.

⁴ *Hardy v. Simpson*, 13 Ired. 132.

⁵ *Huntzinger v. Harper*, 44 Penn. St. 206; *Carter v. Grinnells*, 67 Ill. 270; *Pocock v. Hendricks*, 8 Gill & J. 421.

⁶ The cases in which the court will determine the question of fraud as an inference of law, the facts being clearly proved or admitted, are those of sales in which the rights of creditors are concerned. In other cases of alleged fraud, the imputed intent and *scienter* are subjects for the consideration of the jury. *Sherwood v. Marwick*, 5 Me. 295.

⁷ *Smith v. Acker*, 23 Wend. 653; *Conkling v. Shelley*, 28 N. Y. 360; *Bishop v. Cook*, 13 Barb. 326; *Bucklin v. Thompson*, 1 J. J. Marsh. 223; *Letcher v. Norton*, 5 Ill. 575.

sistent with the face of the deed, is *prima facie*, but not conclusive, evidence of fraud.¹ In *Funk v. Staats*,² where the mortgagor remained in possession after condition broken, contrary to the terms of the deed, it was held to be fraudulent *per se*, and admits of no explanation. But whether the possession was changed or not was considered a matter of fact for the jury.

The general rule is, that possession by a mortgagor of chattels is as a question of law presumptive of fraud; but if facts be adduced to rebut it, it is then a question for the jury.³

But the question upon which a difference of opinion exists is, whether possession by the mortgagor, with power to sell the goods in the ordinary course of business, is void, *per se*, as a question of law. In *Griswold v. Sheldon*,⁴ by an equally divided court, the question was decided as one of law, and this is the doctrine of the New York courts;⁵ and the same is held in Ohio and Illinois;⁶ but a different doctrine is held in Maine, Massachusetts, Michigan, and Iowa. In *Hughes v. Corey*,⁷ it is held to be a question for the jury whether there is fraud or not in the transaction; and in *Gay v. Bidwell*,⁸ the same is held. In a late decision by Judge Lowell, of the United States District Court, in Massachusetts, this question was well considered, and the conclusion is reached that such a mortgage is not fraudulent as a question of law.⁹

In New York it has been held that, where a retail store was sold, and a chattel mortgage taken on the entire stock by

¹ *Reed v. Jewett*, 5 Ma. 96; *Gardner v. Adams*, 12 Wend. 297; *Macomber v. Parker*, 14 Pick. 497.

² 24 Ill. 632.

³ *Griswold v. Sheldon*, 4 N. Y. 580; *Ford v. Williams*, 24 N. Y. 359; *Holbrook v. Baker*, 5 Ma. 309; *Hull v. Carnley*, 2 Duer, 99; *Watson v. Williams*, 4 Blackf. 26. But though the mortgagor may sometimes retain possession, yet he must first deliver the goods to the mortgagee, to render the mortgage valid against the mortgagor's creditors. *Carrington v. Smith*, 8 Pick. 419; *Gale v. Ward*, 14 Mass. 352. This is the general rule; but in New Hampshire it is held no formal delivery is necessary if the mortgage is duly executed and recorded. *Call v. Gray*, 37 N. H. 428.

⁴ 4 N. Y. 581.

⁵ *Edgell v. Hart*, 13 Barb. 380; *Marston v. Vultee*, 8 Bosw. 129.

⁶ *Brown v. Webb*, 20 Ohio, 389; *Read v. Wilson*, 22 Ill. 377.

⁷ 20 Iowa, 399.

⁸ 7 Mich. 519.

⁹ 13 Alb. L. Jour. 361.

schedule, and the mortgage provided, also, that all articles of a like nature that might be in the store at the time of default in the condition should be subject to it, and that the mortgagor should continue in possession, but should not sell on credit, the mortgage was fraudulent against creditors on its face, and should not, therefore, be submitted to a jury.¹

§ 268. *In Sale of Property.* — The question as to the real nature of the transaction when property is transferred, where the evidence is conflicting, must be a question of fact; though it is a question of law to declare what shall make the transfer fraudulent, or, in other words, what are the *indicia* of fraud.

Thus, a deed made by one insolvent, for an inadequate consideration, would *per se* as a matter of law be fraudulent.² And inadequacy of consideration of a nature so gross as to shock the conscience, is *per se* evidence of fraud.³

But where there is not sufficient in point of law to declare a transfer fraudulent, the question whether a sale of property was made with the intent to hinder, delay, or defraud creditors is a question of fact for the jury.⁴

In general, the good faith in a transaction is matter of fact appropriate for the consideration of a jury.⁵

The retention of property after a sale is merely presumptive proof of fraud, and is a proper subject for submission to the jury.⁶

A voluntary conveyance is not *per se* fraudulent; whether it is so or not, depends on the intention of the parties, and is

¹ *Edgell v. Hart*, 9 N. Y. 213. See *Yates v. Olmstead*, 56 N. Y. 632, where the mortgage was held valid when there was no arrangement permitting the mortgagor to deal with the mortgaged goods.

² *Barrow v. Bailey*, 5 Fla. 9; *Bay v. Cook*, 31 Ill. 386; *Bryant v. Kelton*, 1 Tex. 415.

³ *Surget v. Byers*, Hampst. 715; *Burch v. Smith*, 15 Tex. 219; *Hamet v. Dundass*, 4 Penn. St. 178.

⁴ *Allen v. Cowan*, 23 N. Y. 502; *Booth v. Bunce*, 33 N. Y. 139; *Peck v. Crouse*, 46 Barb. 151.

⁵ *Jennings v. Gage*, 13 Ill. 611; *May v. Walter*, 56 N. Y. 8.

⁶ *Miliard v. Hall*, 24 Ala. 209; *Brooks v. Powers*, 15 Mass. 244; *King v. Bailey*, 6 Mo. 575; *Forkner v. Stuart*, 6 Gratt. 197; *Gleason v. Day*, 9 Wis. 498. The presumption is not as strong in the case of real estate, but it is a proper question for a jury. *Noble v. Coleman*, 16 Ala. 77; *Steward v. Thomas*, 35 Mo. 202; *Allentown Bank v. Beck*, 49 Penn. St. 394; *Hancock v. Horan*, 15 Tex. 507.

a question of fact.¹ Where, however, the legal effect of such voluntary conveyance, as appears *from the instrument*, is to hinder or delay creditors, it is a matter of law for the court.²

Still, where certain facts are admitted, as indebtedness beyond the value of the property, and a voluntary conveyance is made, it is fraudulent *per se*, and should be so pronounced by the court.³

§ 269. Other Instances of Fraud. — Fraudulent representations by the agent of a mining company in selling the stock of the corporation, and whether the purchaser was thereby deceived, are for the jury.⁴ In fact, in all transactions alleged to be fraudulent, by reason of representations made, inducing another to act, the fraudulent intent must be a question of fact to be ascertained from the evidence and surrounding circumstances, especially where the transaction can in any manner be shown to be consistent with good faith.⁵ So, where one was induced to sell his farm in exchange for worthless railroad stock by means of false representations, it was held that all matters tending to show that the statements of the defendant as to the value of the stock, and the condition of the company, were falsely made, and that the plaintiff, though having some knowledge of the character and responsibility of the company, was governed by the representations of the defendant, who was a financial agent of the corporation, and that representations were made by the defendant on the same day to influence the plaintiff in making the contract, are all proper questions of fact.⁶

So, in an action for fraud in the sale of patent rights, it was held that it was a question of fact, as to the intent, to be inferred from the connection and effect of an extended conver-

¹ *Dygert v. Remerschnider*, 32 N. Y. 637; *Babcock v. Eckler*, 24 N. Y. 625; *Gardner v. Boothe*, 31 Ala. 189; *Benton v. Jones*, 8 Conn. 186; *Marston v. Marston*, 54 Maine, 476; *Lane v. Kingsberry*, 11 Mo. 402.

² *Ewing v. Gray*, 12 Ind. 70.

³ *Hanson v. Buckner*, 4 Dana, 251; *Vertner v. Humphreys*, 22 Miss. 130.

⁴ *Crump v. Mining Co.* 7 Gratt. 369.

⁵ *Burr v. Todd*, 41 Penn. St. 214.

⁶ *Yates v. Allen*, 41 Barb. 172.

sation between the parties.¹ And where, on the sale of a cow, there was some evidence that representations were made, false to the knowledge of the vendor, the court refused to charge the jury as a matter of law that this constituted fraud, holding it was a conclusion of fact, and not of law.²

§ 270. *Malice*. — Malice is only another instance of an intent of the mind, and, like fraud, may be what is termed *malice in law* and *malice in fact*. That is, there are certain acts from which, without further proof, malice as an intent of the mind will be inferred. Thus, in cases of homicide, when a man kills another suddenly, without any, or without a considerable provocation, the law implies malice;³ and malice is presumed from the use of a deadly weapon.⁴ So, in actions for libel and slander, if it be clearly shown that the words constitute a libel or slander, malice is presumed.⁵ But in other cases where malice is a necessary ingredient, it is a question of fact to be found by the jury, as in actions for malicious injuries, malicious arrest, and malicious prosecution.

¹ Peck v. Bacon, 18 Conn. 387.

² Hadley v. Importing Co. 13 Ohio N. S. 505. Whether bids were fraudulently made at a sale is a question of fact. Reynolds v. Dechaums, 24 Tex. 177; Broth-erline v. Swires, 48 Penn. St. 69. Whether a sale is fraudulently made to evade an execution is a matter of fact. Deakers v. Temple, 41 Penn. St. 242. Also where a minor purchases, partly on credit, from a firm in straitened circumstances; Matthews v. Rice, 31 N. Y. 460; and whether a judgment was fraudulently obtained. Maverick v. Salinas, 15 Tex. 57. Whether there is a fraudulent combination between vendors and purchaser to charge another as partner. Porter v. Wilson, 13 Penn. St. 650. And whether there was fraud in the sale of lots by exhibiting a plat thereof. McCall v. Davis, 56 Penn. St. 433; Griffith v. Ely, 12 Mo. 520.

³ 4 Bl. Com. 200; 1 Hawk. P. C. c. 31, § 32; Riley v. State, 9 Humph. 646; Mitchin v. State, 11 Geo. 615; U. S. v. Travers, 2 Wheeler C. C. 490; Commonwealth v. York, 9 Met. 93; Commonwealth v. Knapp, 9 Pick. 496; Green v. State, 28 Miss. 687; Hayne v. State, 34 Miss. 616; People v. Stonecifer, 6 Cal. 405; People v. March, 6 Cal. 543; State v. Knight, 43 Me. 11, 137; Murphy v. People, 37 Ill. 447, 457. The doctrine of *malice in law*, as inferred from acts of killing, was not approved in Stokes v. People, 53 N. Y. 179, where a charge laying down the doctrine was held erroneous. It is unquestionably the doctrine of the common law, but it has not been generally accepted here. See a most exhaustive examination of the subject in 8 Am. L. Rev. 42.

⁴ Head v. State, 44 Miss. 731.

⁵ Rex v. Lord Abingdon, 1 Esp. 228; Rex v. Harvey, 2 B. & C. 257; Bodwell v. Osgood, 3 Pick. 379; Root v. King, 7 Cow. 613; Washburn v. Cooke, 3 Denio, 110; Swan v. Tappan, 5 Cush. 104.

In an action for a malicious prosecution, malice is a necessary ingredient, and must be found as a matter of fact; it may be inferred from a want of probable cause by the jury.¹ Thus, it is said in a California case: "Malice must be shown, in order to support the action for malicious prosecution; but it is not necessarily to be inferred from want of probable cause. There may be want of probable cause and no malice; but the jury may find the fact of malice from the circumstances of the want of probable cause."²

And in a case in Pennsylvania the doctrine is similarly stated: "Want of probable cause is not malice itself, but only evidence of malice. It has not the force of a legal conclusion, and therefore the existence of malice is a fact to be found by a jury. It is true there are certain things which, if proved, the law declares to be conclusive evidence of malice; but mere want of probable cause is not one of them. If a prosecution be instituted for the purpose of extorting money or other property, the law implies malice."³

Where a mode of punishment by the master of a ship is unjustifiable, whether it was from malice, hatred, or revenge, is a question of fact for the jury.⁴

§ 271. Probable Cause. — It was formerly considered that the question of probable cause was one of fact, but it is now conclusively settled that it is one of law, as to what will amount to probable cause to justify a party instituting a prosecution.⁵

¹ *Oliver v. Pate*, 43 Ind. 132; *Levi v. Brannan*, 39 Cal. 485; *Closson v. Staples*, 42 Vt. 209; *Ritchey v. Davis*, 11 Iowa, 124; *Grinnell v. Stewart*, 32 Barb. 544; *Heyne v. Blair*, 3 Thomp. & C. (N. Y.) 264.

² *Harkrader v. Moore*, 44 Cal. 144. The court cannot instruct that there is no evidence of malice. *People v. Roberts*, 6 Cal. 217. See *Cloon v. Gerry*, 13 Gray, 202.

³ *Schofield v. Ferrers*, 47 Penn. St. 196.

⁴ *United States v. Alden*, Sprague, 95. Malice may be inferred from activity and zeal displayed by the defendant in conducting the prosecution. *Straus v. Young*, 36 Md. 246.

⁵ *Panton v. Williams*, 2 Q. B. 169; *Turner v. Ambler*, 10 Q. B. 252; *Halles v. Marks*, 7 Hurl. & N. 55; *Israel v. Brooks*, 23 Ill. 575; *Grant v. Moore*, 29 Cal. 644; *Stevens v. Fassett*, 27 Me. 266; *Marks v. Gray*, 42 Ibid. 86; *Lawyer v. Loomis*, 3 Thomp. & C. (N. Y.) 393; *Besson v. Southerd*, 10 N. Y. 240; *Von Latham v. Libby*, 38 Barb. 343; *Ash v. Marlow*, 20 Ohio, 119.

But whenever the facts are controverted, it is a question for the jury, as to whether there was probable cause or not; but under instruction from the court.¹

Hence, in an action for a malicious arrest, it is not error to refuse an instruction implying that it is for the jury to determine what acts made the plaintiff liable to arrest.² It was held error in a case in New York, when the court left it to the jury to determine whether certain facts did exist, and if so, whether they justified the defendant so as to amount to probable cause.³

Absence of probable cause cannot be inferred from proof of malice.⁴

PART III. WHERE THE EFFECT IS MOST CONSIDERED.

§ 272. *Effect of Certain Acts or Omissions.* — In many instances, when we are called upon to distinguish between a question of law and of fact, the effect of a certain act, or combination of acts, or of some omission of duty, is to be determined. This has sometimes to be done irrespective of any intent that may exist at the time of the act or omission. It is necessary to decide on the effect produced by an act, even if the person doing it may not have contemplated the act to have that precise effect. We rather regard how others may be affected by it in giving it a legal quality and effect. Now in a large number of cases this is the question presented — an act or series of acts has to be *characterized*. Thus, it is required to be determined what acts shall be considered as giving notice, demand, authority, or possession; whether certain other acts shall be construed as showing payment, delivery, knowledge, care, or skill; and whether an omission shall amount to negligence, for negligence is nothing more than the omission of a plain and obvious duty.⁵

¹ Cloon v. Gerry, 13 Gray, 202; Cole v. Curtis, 16 Minn. 182; Driggs v. Barton, 44 Vt. 124; Masten v. Deyo, 2 Wend. 425.

² Reno v. Wilson, 49 Ill. 95.

³ Bulkley v. Smith, 2 Duer, 261. See Ewing v. Sandford, 19 Ala. 605.

⁴ Mitchinson v. Cross, 58 Ill. 366.

⁵ Negligence consists in omitting to do what a person ought to do. It is of the essence of negligence that the party charged should have knowledge that there was a duty for him to perform, or he must have omitted to inform himself as to what his duty was in a given case. *Sherman v. Western Co.* 62 Barb. 150.

In many of these cases it is not necessary to consider the intent so much as the *effect* of the act.

It will be observed in many of the cases that the law attaches a certain effect, or legal character, to an act or combination of acts; and we may well inquire why in one instance we determine as a question of law what shall be the legal effect of an act, and in another submit the matter to the judgment of a jury. Why, for instance, can we say, as a question of law, that a certain act does amount to a delivery, and a certain other act amount to possession, and leave it open, as a question of fact, whether a certain act was equivalent to knowledge or notice? The reason is simply this, that in the former instance, the law has found it expedient from oft-recurring cases to declare a rule; in the latter, uncertain considerations may often enter, so that a determinate rule cannot be settled, and therefore it is considered best to leave it open as a question of fact to be determined according to the circumstances of each occasion; as, for instance, in the case of negligence, which can rarely be subject to or governed by a rule.

We will now examine some of these instances in which we are required to declare what the effect of certain acts shall be.

§ 273. *Authority.* — The question that is generally presented in this connection is as to the character with which a person may invest another, what extent of power he may confer upon him, either expressly or impliedly. In other words, we have to determine what the effect of another's acts is in permitting himself to be represented in a given capacity or situation. These inquiries often arise in cases of agency and partnership.

The decisions on this subject are not harmonious; one reason may perhaps be, that the law is in a formative process; rules are being evolved, according to a principle previously stated. We must expect, on this subject especially, that there will be definite rules of law.

There are generally two questions presented in connection with this subject: first, as to the existence of the relation; secondly, as to scope of the authority exercised. If there be a

written authority, there is no longer a question as to the relation; that question arises only when the relation is to be determined from the acts of the parties.

§ 274. *As to its Existence.* — In case of denial, it falls within the province of the jury to find the existence of the relation from certain acts and circumstances.¹ Thus, whether there is a relation of principal and agent between an employer and those who build a wall for him, so as to hold him liable for injury, is a question of fact;² and also the existence of an agency in a question of insurance.³ So, whether a warehouseman, in receiving goods, acted as an agent of the carrier, or of a vendee in a case of stoppage *in transitu*.⁴ Where indorsements were made on a promissory note in an unknown handwriting, the agency is a question of fact.⁵

It is, however, a question of law for the court, as to what acts or admissions shall be admitted in evidence to bind the principal.⁶ But very slight evidence that a person assuming to act as the agent of another should suffice to carry the question to the jury.⁷

Where a proprietor of a sugar refinery became insane, and the defendants, having an interest in the establishment, told the superintendent to continue the works and employ the necessary help, and thereupon the plaintiff was still retained, it was held a question of fact as to the authority thus conferred;⁸ and where the son of a co-surety notified the creditor to bring an action against the principal debtor, his authority to give such notice is a question for the jury.⁹

The question whether one in business claiming and holding himself out to be acting as "agent" for another, is in fact acting as agent or on his own account, is properly a question of fact.¹⁰

¹ U. S. v. Sander, 6 McLean, 598; Pomeroy v. Sigerson, 22 Mo. 598.

² Benedict v. Martin, 36 Barb. 289.

³ Nicholl v. Ins. Co. Wood. & Minot, 533.

⁴ Hoover v. Tibbitts, 13 Wis. 81.

⁵ Valentine v. Packer, 5 Barr, 335.

⁶ Cliquot's Champagne, 3 Wall. 115; Lamb v. Irwin, 69 Penn. St. 436.

⁷ West Transp. Co. v. Hawley, 1 Daly, 327.

⁸ Colgan v. Aymar, Hill & Denio, 28.

⁹ Klingensmith v. Ex'rs, 31 Penn. St. 461.

¹⁰ McClune v. Cain, 2 Keyes (N. Y.), 203; Stewart v. Johnson, Coxe (N. J.), 27

It is also a question of fact as to whom credit was given. So, although an agent at the time he makes a verbal contract discloses to the other party his agency, and gives the name of his principal, it is a question of fact whether the credit was given to the agent or the principal, to be determined from the conversation and acts of the parties at the time of making the contract.¹

It must be observed, that while in general the existence of the relation is a question of fact when a consideration is to be made of many acts and circumstances, it may also be a question of law as to the effect of certain acts, when undisputed, to create an agency or a partnership. We find this constantly done by the court.² So partnership is a question of law, dependent on the facts;³ but where there is any doubt as to the facts, it becomes a question for the jury to decide.⁴

§ 275. As to its Extent. — The decisions in this respect differ; but it is believed that if a distinction be made between a *special* and *general* agency, there will not be found any serious divergence of opinion. When it is required to determine what acts are legitimately within an authority conferred in case of a general agency, when many circumstances and ordinary usage are to be considered, it becomes properly a question of fact for a jury; as the power to indorse a note,⁵ authority to act as partner,⁶ to draw checks,⁷ or in doing any other act.⁸

However, where an undisputed authority is conferred, the question whether any given act be within the scope of that authority is a question of law, and the court should decide it precisely as if that authority were in writing.⁹ So, where there is no conflict in evidence it is error to submit to the

¹ Horey v. Pitcher, 13 Mo. 191.

² Gulick v. Grover, 4 Vroom, 463; Davis v. Lee, 26 Miss. 505; McCready v. Wright, 5 Duer (N. Y.), 571; Emerson v. Miller, 27 Penn. St. 278.

³ Robinson v. Green, 5 Harring. (Del.) 115.

⁴ McMullan v. McKenzie, 2 Greene, 368; Doggett v. Jordan, 2 Fla. 541.

⁵ Hawkinson v. Lombard, 25 Ill. 574.

⁶ London Savings Fund v. Hagerstown Bk. 36 Penn. St. 507.

⁷ Bank v. Admr. 37 Ala. 227.

⁸ Taylor v. Labcane, 14 Mo. 572; Krebs v. O'Grady, 23 Ala. 732; Spadone v. Manvel, 2 Daly, 263.

⁹ Coykendall v. Eaton, 42 How. Pr. 378; Latham v. Westvelt, 26 Barb. 256.

jury the question whether the acts of a factor were a breach of his instructions.¹

The limit of the authority of a special agent is generally a question of law. In this instance the court will take cognizance of a known usage in any business, so as to determine whether one exceeded his authority in acting in a given manner. Thus, the extent of authority of a bank cashier is a question of law.² It is a principle recognized and acted upon, that it is the duty of the court to determine the scope of an authority of a special agent, where the authority is express. An example in point is the case where one Schuyler, as agent of the New York and New Haven Railroad Company, falsely certified certificates for a large amount, which were negotiated by a bank; and in an action by the bank to recover from the company, the court in an elaborate decision held that the action would not lie against the company, as the acts of its agent were beyond the scope of the special authority conferred.³

§ 276. Ratification. — In determining whether an authority has been conferred, or whether certain acts of an agent have been within his authority, it is important to learn if the principal has adopted these acts. What particular acts will amount to a ratification must be generally a question of law for the court. Thus it has been decided that long silence after a knowledge of the facts will be a ratification.⁴

So, in a Texas case the rule is properly held, that the question of ratification is, in general, a question for the court to decide; but where the evidence is doubtful and may admit of different interpretations, there it seems proper to submit it to the decision of the jury.⁵ The same doctrine is substantially held in an Illinois case,⁶ where it is held that "a party is liable for materials, for his use by another, if he voluntarily availed himself of the use of the materials, or in any manner

¹ *Millbank v. Dennistown*, 21 N. Y. 386.

² *Bank v. Hanmer*, 14 Mich. 212.

³ *Mechanics Bank v. New York, &c. R. R. Co.* 13 N. Y. 597. This case gives a most thorough examination of the cases of agency.

⁴ *Mangam v. Bell*, 20 La. An. 215. See *Meehan v. Forrester*, 52 N. Y. 277; *Murray v. Walker*, 44 Geo. 58; *Thorn v. Bell, Hill & Denio*, 430.

⁵ *Commercial Bank v. Jones*, 18 Tex. 812.

⁶ *Fisher v. Stevens*, 16 Ill. 397.

ratified the act of obtaining them ; and these are questions for the jury to settle." That is, the law determines what shall amount to a ratification, and it then devolves on the jury to find whether the necessary facts exist.

§ 277. *Insurance.* — Many questions arising in connection with insurance relate to the extent of an agent's authority, or the effect of certain acts of the insured, as concealment and misrepresentation, and we need to determine how far such questions are matters of fact to be decided by a jury. Frequent adjudications have settled rules of law relating to insurance, and the province of the jury in this field is becoming limited, except where there is a conflict in the testimony and a doubt as to the facts. As far as the interpretation of the contract, as contained in the policy, is concerned, it is a matter to be settled by the court, on the general principle that the construction of a written instrument is a question of law, except where the meaning is doubtful, when evidence *aliunde* has to be produced, and then a question of fact arises. This, however, will come under consideration when we treat subsequently of the effect of written instruments.

§ 278. *Powers of Agents.* — If an agent's powers are to be ascertained from a written instrument, or if he be a special agent for a well-known purpose, it will be a question of law to declare the scope of his authority according to the general principles established in previous sections.¹ So, where representations were made to an agent, and the company denied his agency for the purpose, it was held proper to submit the question as one of fact to the jury, as his powers or duties were not defined in writing.² So, whether an insurance agent has authority to vary terms is a question of fact.³

Generally, where the powers of an agent are not defined, whether his acts and his knowledge are identified with those of his principal are questions of fact for the jury

¹ *Rowley v. Ins. Co.* 36 N. Y. 550 ; *Insurance Co. v. Wilkinson*, 13 Wall. 222 In this last case the court held very strict views in relation to an agent's authority.

² *Hough v. Ins. Co.* 29 Conn. 10.

³ *Sheldon v. Ins. Co.* 25 Conn. 207.

§ 279. **Abandonment.** — Where a vessel is abandoned as a total loss, it is for the jury to say whether the facts justified the abandonment, and also the propriety of a sale of the cargo under the circumstances.¹ Whether an abandonment was accepted or not, is a question of fact;² so whether it is waived or not is a question for the jury, to be decided by the circumstances of the case.³

The revocation of an abandonment, before it is accepted by the underwriters, may be inferred from the conduct of the assured, but it is a question of fact for the jury.⁴

§ 280. **Concealment of material facts,** such as extra risks and incumbrances, are generally questions of fact so as to determine whether the concealment was intentional or fraudulent.⁵ Thus, in an action upon a fire insurance policy, the defence was that carpenter-work was done in the building insured, which was not disclosed to the insurers. There was no actual concealment or fraud proved, no misrepresentation or intentional suppression of facts, nor was any inquiry made at the time of issuing the policy as to the uses for which the building was to be applied; and it was held that it was for the jury to say whether there was a concealment such as would avoid the policy.⁶ So, where at the time of an application, a house was described as of brick, and afterwards it was shown to have been incorrect, but the insured was not asked specifically, it was held a proper question of fact to be passed upon by the jury as to the effect of the concealment.⁷

§ 281. **Misrepresentation of material facts in a policy,** by an insured, as a matter of law, will avoid the policy; but whether these facts are material is a question of fact.⁸ It is

¹ Delaware Ins. Co. v. Winter, 38 Penn. St. 176.

² Bell v. Smith, 2 Johns. 98.

³ Curcier v. Ins. Co. 5 Serg. & R. 113; King v. Ins. Co. 1 Conn. 333.

⁴ Columbian Ins. Co. v. Ashley, 4 Pet. 139.

⁵ Firemen's Ins. Co. v. Walden, 12 Johns. 513; Burritt v. Ins. Co. 5 Hill, 188; Gates v. Ins. Co. 2 N. Y. 43; Clark v. Ins. Co. 40 N. H. 333.

⁶ People v. Ins. Co. 2 Thomp. & C. (N. Y.) 268.

⁷ Woods v. Ins. Co. 50 Mo. 112.

⁸ Schroeder v. Ins. Co. 46 Mo. 174; Mutual, &c. Ins. Co. v. Deal, 18 Md. 26; Franklin, &c. Ins. Co. v. Coates, 14 Md. 285; Hartford, &c. Ins. Co. v. Harmer, 2 Ohio N. S. 452; Keeler v. Ins. Co. 16 Wis. 523.

for the jury to determine whether the facts which appear in evidence are so far inconsistent with the answers of a person insured as to establish misrepresentation.¹

So a misrepresentation as to the degree of risk.² And where a policy prescribes that notice of any increase in the risk shall be given in a specified time, and when alterations are made, and no notice is given, the increase of the risk is a question of fact.³

Whether representations are fraudulent or not, is a question of fact for the jury under instruction.⁴

It is the same if the representations are contained in a separate paper, to which the policy refers, and the materiality is a question of fact.⁵

Whenever a representation amounts to a warranty, it is no longer a question of fact; it becomes then subject to a rule of law, and it would be erroneous to submit such a question to the jury. So, in *Le Roy v. Insurance Co.*,⁶ a policy of insurance declared the survey or description of the premises referred to therein to be a part of the policy, and it was held to be error to submit to the jury the question whether a misdescription did or did not increase the risk. In a case in New York it was said,⁷ "A warranty being in the nature of a condition precedent and therefore to be performed by the insured before he can demand the performance of the contract on the part of the insurer, it is quite immaterial for what purpose, or with what view it is made, or whether the insured had any view at all in making it." Accordingly, in this State, there is a very strict rule of law in regard to representations by an

¹ *Campbell v. Ins. Co.* 98 Mass. 381.

² *Washington, &c. Ins. Co. v. Ins. Co.* 5 Ohio N. S. 476; *Appleby v. Ins. Co.* 45 Barb. 457; *Shepherd v. Ins. Co.* 38 N. H. 232; *Gamwell v. Ins. Co.* 12 Cush. 167.

³ *Schenck v. Ins. Co.* 4 Zab. 447.

⁴ *Cumberland, &c. Ins. Co. v. Mitchell*, 48 Penn. St. 374; *Ins. Co. v. Welles*, 14 Wall. 375.

⁵ *Boardman v. Ins. Co.* 20 N. H. 551.

⁶ 39 N. Y. 90.

⁷ *Ripley v. Ins. Co.* 30 N. Y. 136. In a late case decided by the Supreme Court of the United States, *Aetna Life Ins. Co. v. France* (Feb. 1876), there is a strict rule laid down regarding representations stipulated to be warranties between the parties. It was held error to leave to the jury the question of the materiality of such representations.

insured, which often removes such questions from the jury, as there is a tendency to construe representations, when understandingly and clearly given as warranties.¹ In this last case the authorities on the subject are very thoroughly examined.

A material misrepresentation of future uses of a building is as fatal, as of present facts. Thus, the inquiry in a policy was, "During what hours is the factory worked?" and the answer was, "We run the cards, pickers, &c., day and night; the rest twelve hours daily. . . . We shall not run nights over four months." This was held to constitute a positive agreement to desist running at night within four months.²

§ 282. Questions as to Notice. — It is often required in a policy that certain notice shall be given, as when a building is erected contiguous to that insured, when repairs are made, and when certain articles are stored. In such cases, whether the facts were sufficient to justify a notice being given, or whether the notice was given, are questions for the jury to decide.³ Thus, when a policy required, if any erection should be made contiguous, notice should be given, and where the defence was that such a building was erected, it was held proper to submit the question to the jury as to the contiguity of this building so as to increase the risk.⁴ And where a policy provided that it should be avoided by a transfer of the insured property, and there was a transfer, of which no notice was given, and the premiums were paid and receipts given as usual, it was held a question of fact whether the transfer was known to the company, the court instructing that the receipt of the premiums tended to show an acquiescence in the transfer.⁵ So, what notice, by letter or otherwise, from an insurance company will be sufficient to guard against the inference that they intend to waive any right under the policy, is a proper question for the jury, and the judge should not instruct them, as a matter of law, that the company by a letter had prevented such inference.⁶

¹ *Fitch v. Ins. Co.* 59 N. Y. 557.

² *Billbrough v. Ins. Co.* 5 Duer, 587.

³ *Drake v. Ins. Co.* 3 Grant (Penn.), 325; *Grant v. Ins. Co.* 5 Hill, 10; *Haskins v. Ins. Co.* 5 Gray, 438.

⁴ *Ritter v. Ins. Co.* 40 Mo. 40.

⁵ *Buckley v. Garrett*, 47 Penn. St. 204.

⁶ *Davis v. Ins. Co.* 4 R. I. 277.

§ 283. **Other Cases in respect to.** — When there is a dispute as to the buildings insured, it is proper to submit the question to the jury.¹ Whether an application to an insurance company by a party desiring to be insured has been declined or not, is a question exclusively for the determination of the jury.² Whether preliminary proofs of loss furnished are sufficient to satisfy the requirements of the policy, and whether facts shown amount to a waiver of defects in the proofs, are questions of law for the court; but whether the proofs were furnished, or the acts done which are relied on as constituting a waiver, are questions of fact.³

Whether keeping a small quantity of tow in a building amounts "to using it for storing flax," within a prohibitory condition in a policy, is a question of fact.⁴ So, as to the manner in which a person's death was occasioned, whether by his own act or by disease.⁵

To a question of what disease a person died, the answer was "unknown." It was held that it should have been left to the jury to say whether this meant unknown to the applicant or to any one.⁶ So, whether a chaplain in the army is in the military service, and whether the assured, if in the military service, was ever actually employed in such service.⁷ So, who is an "attending physician;"⁸ and whether a note given to a mutual company is an ordinary open policy note, or was given as a premium note in advance.⁹

In cases where there is a positive prohibition of law against the carrying or assuming of a certain risk, it cannot be left to the jury to say whether a party was guilty of negligence in violating such a prohibition; it must be a matter of law for the court.¹⁰ And whether, when the facts are proved, a pol-

¹ *Lycoming Ins. Co. v. Sailer*, 67 Penn. St. 108; *Beatty v. Ins. Co.* 52 Penn. St. 456.

² *Mutual Ins. Co. v. Wise*, 34 Md. 582.

³ *Miller v. Ins. Co.* 2 E. D. Smith, 268.

⁴ *Hynds v. Ins. Co.* 13 N. Y. 554.

⁵ *Trew v. Ass. Co.* 6 Hurl. & N. 838; *Cluff v. Ins. Co.* 13 Allen, 308; *Harper v. Ins. Co.* 19 Mo. 506.

⁶ *Swift v. Ins. Co.* 2 Thomp. & C. (N. Y.) 302.

⁷ *Mutual, &c. Ins. Co. v. Wise*, 34 Md. 582.

⁸ *Gibson v. Ins. Co.* 37 N. Y. 580.

⁹ *Brower v. Hill*, 1 Sandf. 629.

¹⁰ *Citizens' Ins. Co. v. Marsh*, 41 Penn. St. 386.

icy is a wager policy, and therefore void, is a question of law.¹

What will constitute unseaworthiness is a question of law; but whether it was concealed or not at the issuing of the policy is for the jury.²

§ 284. **Knowledge and Notice.**— Knowledge and notice are sometimes of the same import; but notice implies, in some instances, a formal proceeding rendered necessary by law, and has more of a technical meaning.³ But on many occasions when the word “notice” is used, knowledge is more properly signified.

The question of knowledge, as a general rule, is a question of fact; as the knowledge of any defect in an article sold or transferred, as in the case of negotiable paper,⁴ of the vicious nature of an animal,⁵ of payment so as to charge an indorser.⁶ So is the knowledge of the violation of a condition in a deed by a tenant;⁷ and the knowledge of an employee as to dangers to which he may be exposed in his employment.⁸

In regard to notice, before the decisions can be explained, we must consider what is termed *actual notice* and *constructive notice*. Notice is said to be actual when it is directly or personally given to the party to be notified; it is constructive when a party must be informed from certain acts or circumstances, and the law presumes the notice.⁹ The question of actual notice is one of fact for the jury; whether it is legal and sufficient is one of law for the court to determine;¹⁰ so, when the facts are admitted, if they amount to notice is a question of law.¹¹

¹ Valton v. Ins. Co. 22 Barb. 10.

² Rosenheim v. Ins. Co. 33 Mo. 235.

³ Potwine's Appeal, 31 Conn. 381.

⁴ Goodman v. Simonds, 20 How. (U. S.) 343; Roth v. Calvin, 32 Vt. 125; Campbell v. Rusch, 9 Iowa, 337.

⁵ Arnold v. Norton, 25 Conn. 95.

⁶ Weaver v. Page, 6 Cal. 681.

⁷ Collins Co. v. Marcy, 25 Conn. 242.

⁸ Hayden v. Manfg. Co. 29 Conn. 558.

⁹ Jordan v. Pollock, 14 Geo. 145.

¹⁰ Bradbury v. Falmouth, 18 Me. 65.

¹¹ Stanley v. Bank, 23 Ala. 650; Nevins v. Bank, 10 Mich. 547; Farmers' Bk v. Vail, 21 N. Y. 487.

Constructive notice, in many instances, is a question of law;¹ in some cases always so, as to the notice of the pendency of an action, of a prior lien or incumbrance, or of any fact, of which the mode of giving notice is pointed out by statute, as in the case of advertisements.

In other cases it may be a question of law, where the facts are not doubtful, from which this notice is to be inferred. The principle upon which such a legal inference is drawn is that a person should be supposed to have knowledge of a fact of which the exercise of ordinary prudence and diligence must have apprised him.²

But in cases of prior equities or liens on property, unrecorded, it is a question of fact whether a subsequent purchaser has had notice; as whether the possession of a vendee is of such a character as to apprise a subsequent purchaser,³ and in the case of a purchaser at a sheriff's sale of an equitable title which had been previously assigned.⁴ Whether one has had actual notice of the dissolution of a partnership is a question of fact.⁵

§ 285. Notice through Printed Labels or Receipts. — In late times, the question very frequently arises as to the effect of certain stipulations in giving notice to a party, when printed on tickets, receipts, and schedules. This comes under the head of constructive notice, and the question will be, whether the notice thus given may be considered a matter of fact or of law. It is a well established rule that a carrier cannot stipulate for any exoneration for his negligence;⁶ but in other cases, where it is provided what shall be done in order to limit the liability as an insurer, it may be inquired whether the receipt of a ticket, a label, or any other document by a party,

¹ *Birdsall v. Russell*, 29 N. Y. 220.

² *Booth v. Barnum*, 9 Conn. 286; *Hobart v. Hilliard*, 11 Pick. 144; *Stafford v. Ballou*, 17 Vt. 329; *Powell v. Healey*, 28 Tex. 52.

³ *Ponton v. Ballard*, 24 Tex. 621.

⁴ *Rhines v. Baird*, 41 Penn. St. 256.

⁵ *Deford v. Reynolds*, 36 Penn. St. 325. Whether a party claiming an appropriation of running water for mining purposes has followed up the posting of a notice of such intended appropriation by reasonable diligence in making surveys, &c., is a question for the jury. *Weaver v. Eureka, &c. Co.* 15 Cal. 272.

⁶ In the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, the authorities are collected on this subject.

shall be considered as notice to him of the terms. It would seem, on general principles, that when one enters into a contract, and accepts a receipt embodying some conditions annexed to that contract, it ought to be a question of law as to the notice thus conveyed, there being nothing more than an inference required from an act. However, the decisions hold that the acceptance of a receipt with a notice of the limit of a carrier's liability, is not of itself sufficient to charge a person with notice as a matter of law; the actual notice is a question of fact.¹ It is only *prima facie* evidence of notice from which a presumption can be drawn. It is now made notice by statute in some States, as for instance in the California code,² in order to settle a point that must very often be presented for decision.

So, a notice posted up requiring guests to deposit valuables in a certain place, is not constructive; it must be proved as a matter of fact, unless made notice by statute, as it is in some of our States.³ So, a notice on a receipt from the master of a tug as to his liability for the acts of his servant, will not be of itself notice; it must be proved that the party had actual knowledge thereof.⁴

§ 286. *Reasonable Time.* — Allied to the question of notice is that of "reasonable time," a term so often found in statutes and contracts. In the determination of such a question, there is a complex idea; in addition to the requirement of time, notice, or diligence, there is a quality or attribute to be attached to the act. It is obvious that many considerations will have to be taken into account to determine what this reasonableness may be; what may be reasonable in one situation may not be so in another. In many cases where a usage or course is well known the court may be able to decide; in others which depend upon particular facts and circumstances,

¹ *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Brown v. R. R. Co.* 11 Cush. 97; *South. Ex. Co. v. Purcell*, 37 Geo. 103; *Strohn v. R. R. Co.* 21 Wis. 554; *South. Ex. Co. v. Newby*, 36 Geo. 635; *Seller v. Pacific*, 1 Oregon, 409; *Kirkland v. Dinsmore*, 4 Thomp. & C. (N. Y.) 304. But see *Hopkins v. Westcott*, 6 Blatchf. 64.

² § 2176.

³ *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417.

⁴ *Symonds v. Pain*, 6 Hurl. & N. 709.

it must be a matter of fact for the jury to determine. Thus, in regard to the non-payment of a bill or draft, the court will decide whether notice was given in a reasonable time.¹ But suppose it were required to determine what is reasonable time where a policy requires a voyage to be completed within a reasonable time. Here the reasonableness would be determined by a consideration of the distance of the voyage, of the weather, and other circumstances. How can these be determined by a rule of law?² So, when an agreement is made for the delivery of goods within a reasonable time, the distance, the facilities of travelling, the bulk and weight of the goods, must be considered; but none of these topics fall within the knowledge of law.³ So, in *Noble v. Kennaway*,⁴ where the defence to an action on a policy of insurance was that there had been unnecessary delay in unloading the cargoes, it was held that this was a question to be decided by the jury, who could not decide without being informed as to the usual practice of the particular trade. So that where no acknowledged rule or principle of law defines the limits between reasonable or unreasonable, the question seems to be one for the jury under all the circumstances of the case.⁵

§ 287. *Reasonable Time, when a Question of Law.*—It follows that in some instances what this reasonable time shall be is a question of law, that is, when there is some known custom or usage, and the facts are not controverted.⁶ Thus, it is a question of law when no facts are involved, as to the reasonable time for rescinding a contract;⁷ and for a patentee to make a disclaimer, who has included in his patent an invention of which he is not the author;⁸ so what shall be a reasonable time for executors to remove goods of a testator.⁹ Six days

¹ *Brooks v. Elgin*, 6 Gill (Md.), 254; *Williams v. Smith*, 2 B. & Ald. 496; *Tindal v. Brown*, 1 T. R. 167.

² *Phillips v. Irving*, 7 M. & G. 325; *Mackay v. Rhineland*, 1 Johns. Cas. 408.

³ *Startup v. Macdonald*, 2 M. & G. 395.

⁴ Doug. 510.

⁵ *Hilton v. Shepherd*, 6 East, 14 (n.); *Fry v. Hill*, 7 Taunt. 397.

⁶ *Blackwell v. Fosters*, 1 Met. (Ky.) 88.

⁷ *Gatling v. Newell*, 9 Ind. 572.

⁸ *Seymour v. McCormick*, 19 How. (U. S.) 96.

⁹ Litt. s. 69.

were held by the court to be a reasonable time for removing the goods of a lessee for life by his executors after his death.¹ And generally where a person is allowed a reasonable time to do an act or not, it is a question of law, when there are no facts in dispute.² What shall be reasonable time to elapse for the blood to cool, from the time of provocation, in case of a homicide, is a question of law;³ but it is for the jury to find what length of time elapsed between the provocation received and the act done.⁴

The reasonableness of a custom or a rule is a question of law,⁵ and so of a rate.⁶

§ 288. *Reasonable Time, when a Question of Fact.* — The reasonableness of a time or a notice must be a question of fact when a variety of facts and circumstances has to be taken into consideration to aid the judgment, and a comparison made with a general course of usage or dealing in any business or calling. Thus, a writer lays down the rule:⁷ "Where the law is silent the jury must draw the inference, not as their own casual fancies or arbitrary opinions may dictate, but according to their judgment and discretion, upon comparison of the facts with the general and understood course of dealing, if any such exist, in reference to the matter litigated; and in the absence of any such guide with reference to mutual convenience and utility, or the ordinary rules of fair and honest dealing; for these, in the absence of any express rule of law, are the proper, and, indeed, the only standards of comparison of which the case admits." On these principles reasonable time as to the performing of a voyage is a question of fact;⁸ so, as to the responsibility of guarantors, where the creditors forbore from proceeding against the principal debtor for nine

¹ *Stodden v. Harvey*, Cro. J. 204. See *Doe v. Smith*, 2 T. R. 436.

² *Graham v. Van Diemen's Land Co.* 30 Eng. L. & Eq. 578; *Phoenix Insurance Co. v. Allen*, 11 Mich. 501; *Luckhardt v. Ogden*, 30 Cal. 547; *Roth v. Buffalo*, &c. R. R. Co. 34 N. Y. 548; *Walker v. Stetson*, 14 Ohio N. S. 89.

³ *State v. Dunn*, 18 Mo. 419; *State v. Lizemore*, 7 Jones L. (N. C.) 206.

⁴ *Reg. v. Fisher*, 8 C. & P. 182.

⁵ *Vedder v. Fellows*, 20 N. Y. 126; *Bourke v. James*, 4 Mich. 336; *Illinois, &c. R. R. Co. v. Whittemore*, 43 Ill. 420.

⁶ *Campbell v. R. R. Co.* 23 Ohio N. S. 168.

⁷ *Stark. Evid.* p. 775.

⁸ *Murrell v. Whiting*, 32 Ala. 54.

years;¹ so, whether an indorsee has presented a bill of exchange for payment in a reasonable time after indorsement;² and whether the bill of a broken bank, or a counterfeit, has been returned in a reasonable time,³ and whether an obstruction on the highway had been there an unreasonable time.⁴

It is a question of fact whether a delay in payment has been vexatious and unreasonable.⁵ So, it is a question for the jury to find whether the time a party takes to answer a proposition or communication is reasonable.⁶

§ 289. Possession. — It will be a question of law to declare what acts shall constitute a possession when these acts are proven; but if the effect of many doubtful acts be required, it must be left to the jury to declare the intent of the party, under instruction from the court.⁷ So, the nature of this possession, when the facts are ascertained, is a question of law, and it is erroneous to submit such a question to a jury, or to refer to them the question of a "legal possession."⁸

So, whether a possession is adverse is a question of law, because it is the determination of the legal character of an act of possession.⁹ It is not for the jury to declare whether the fact of prior possession is evidence of title; it is so declared by law; nor is it a question to be submitted to them to determine that the possession was of such a character that a grant could be fairly presumed from it.¹⁰

¹ *Executrix v. Exrs.* 52 Penn. St. 528.

² *Bank v. Ezell*, 10 Humph. 380.

³ *Magee v. Cormack*, 13 Ill. 289; *Bank v. Baldenwick*, 45 Ill. 375.

⁴ *Chamberlain v. Enfield*, 43 N. H. 356. In this decision the court reviews many cases on this topic.

⁵ *Davis v. Kenaga*, 51 Ill. 168.

⁶ *Porter v. Patterson*, 15 Penn. St. 229. See, for further examples under this, *Conger v. Hudson, &c.* R. R. Co. 6 Duer, 375; *Lawrence v. Ocean Co.* 11 Johns. 241; *Haywood v. Harmon*, 17 Ill. 477; *Cochran v. Toher*, 14 Minn. 385; *Woodnut v. Knowles*, 14 Ohio N. S. 18; *Toledo, &c. Co. v. Parker*, 49 Ill. 385.

⁷ *Truesdale v. Ford*, 37 Ill. 210; *Iron Co. v. Tomb*, 48 Penn. St. 388; *Albin v. Lord*, 39 N. H. 196; *O'Hara v. Richardson*, 46 Penn. St. 385; *Rivers v. Thompson*, 43 Ala. 633; *Patrick v. Admr.* 27 Tex. 579; *La Farge v. Mansfield*, 31 Barb. 347; *St. Peter's Church v. Beach*, 26 Conn. 355; *Eaton v. Jacobs*, 52 Me. 445.

⁸ *Groft v. Weakland*, 34 Penn. St. 304; *Blanchard v. Pratt*, 37 Ill. 240.

⁹ *New Mfg. Co. v. Pendergast*, 4 Fost. (N. H.) 54; *Bowie v. Brake*, 3 Duer, 35; *Paxon v. Bailey*, 17 Geo. 600; *Macklot v. Dubreuil*, 9 Mo. 473; *Cornelius v. Giberson*, 1 Dutcher, 31.

¹⁰ *Castro v. Gill*, 6 Cal. 40.

It is a question of fact whether certain acts show an intention to change a possession, either to relinquish an adverse possession, or to take it under another character.¹ In short, whenever the intent of one is to be inferred from his acts, it is a question of fact; this rule will be found general in these cases.²

The questions generally arising in connection with possession, are those relating to what is termed *constructive* possession, as distinguished from actual possession. This constructive possession is one which is inferred from various acts and declarations; if these are in question, it is a proper matter to submit to a jury; but, when known, the matter then becomes a question of law.³

§ 290. **Sale and Delivery.** — There is a class of frequently recurring questions often presented in connection with sale and delivery.

Similar to the topics last treated, it must be a matter of law to declare what shall be a sale or a delivery;⁴ but the matter does not often come up under this aspect. The question arises when an interpretation is to be put on certain acts of a party, whether we shall infer assent to a proposal, or a discharge of an obligation.

One of the ingredients of a sale is the assent of the parties; and as this assent may not be expressly given, but is to be inferred from various acts, it may, therefore, be a question of fact to determine from acts and conversations the assent or the agreement of the minds of the parties.⁵ In some instances the law defines as a rule what act shall be taken as showing this assent. Thus, if a customer takes up wares off a tradesman's counter and carries them away, and nothing is said on

¹ Lucas v. Daniels, 34 Ala. 189; Oliver v. Williams, 25 Geo. 217.

² Beverly v. Burke, 9 Geo. 440; Cunningham v. Patton, 6 Barr, 355; Keener v. Kaufman, 16 Md. 296.

³ Chandler v. Von Raeder, 24 How. (U. S.) 224; O'Callaghan v. Booth, 6 Cal. 63.

⁴ Delivery without payment of the price, or evidence of some understanding or agreement for credit, is not conclusive evidence of a perfected sale. Ferguson v. Clifford, 37 N. H. 86. What will constitute a sale, De Foncleau v. Shottenkirk, 3 Johns. 170; Clarke v. Marriott, 9 Gill (Md.), 331.

⁵ Thurston v. Thornton, 1 Cush. 89; Greene v. Bateman, 2 Wood. & M. 359.

either side, the law presumes an agreement for the reasonable worth of the goods.¹

Where there is an express contract, it becomes the duty of the court, as a question of law, to declare its terms, if they can be gathered from the contract ; but whether the contract did take place, and if it did, what are its precise terms, what conditions are annexed, whether it is an actual sale, or an agreement for a future purchase, are properly questions of fact.²

Cases frequently come before courts as to sales made by correspondence through the mails or by telegraph. In these instances it is a question of law to decide when the sale was completed and the assent of the parties given to the terms. The law is now quite established on this point. As a rule of law, it is settled that whenever an offer is made in a letter, the party assents, and the sale is made, when the person to whom the offer was sent puts his answer of acceptance in the mail.³ Lord Cottenham declared, in the case of *Dunlop v. Higgins*, in the House of Lords, that "common sense tells us that transactions cannot go on without such a rule." The same rule applies in regard to telegraphic dispatches.⁴

§ 291. A delivery and acceptance, when required to be inferred from certain acts, is ordinarily a question of fact.⁵ There are some acts, however, from which the law will infer a *constructive* delivery. An illustration of this is the case where goods are delivered to a common carrier. When goods are delivered to a carrier selected by the vendee, there is a delivery when they are put into the care of the carrier; but when the vendor selects the carrier, a delivery does not take place until they come into possession of the vendee.⁶ So, in

¹ 2 Bl. Com. 443 ; *Hoadley v. McLaine*, 10 Bing. 482, per Tindal, C. J.

² *Featherston v. Featherston*, 11 Ired. 317 ; *McClurg v. Kelley*, 21 Iowa, 508 ; *De Rider, v. McKnight*, 13 Johns. 293 ; *Boyd v. Brotherson*, 10 Wend. 93.

³ *Adams v. Lindsell*, 1 B. & Ald. 681 ; *Dunlop v. Higgins*, 1 H. L. Cas. 381 ; *Duncan v. Topham*, 8 C. B. 225 ; *Trevor v. Wood*, 36 N. Y. 307 ; *Hallock v. Commercial Co.* 2 Dutcher, 268.

⁴ *Beach v. Raritan Co.* 37 N. Y. 457 ; *Durkee v. R. R. Co.* 29 Vt. 127.

⁵ *Thomas v. Degraffenreid*, 17 Ala. 602 ; *Kelsea v. Haines*, 41 N. H. 247 ; *Jones v. Hook*, 47 Mo. 329 ; *Hall v. Wheeler*, 13 Ind. 372.

⁶ *Benjamin on Sales*, § 693, and cases cited.

reference to the delivery of a deed, the law has declared in some instances what shall amount to a delivery. Thus, if the grantor execute and leave a deed with a third person, at the request of the grantee, it will be a sufficient delivery, and cannot be a question of fact to be submitted to a jury.¹ So, the putting of a deed in the post-office, directed to the grantee, is a sufficient delivery.²

But where the law has established no rules as to what acts shall be deemed a constructive delivery, and when it is to be inferred from evidence of intention, from acts and circumstances that have a doubtful signification, a delivery must be a question of fact to be found by the jury, with instructions as to the presumption of law from the court.³ Thus, it is held in *Earle v. Earle*,⁴ that what amounts to a final delivery and acceptance of a deed is a question of law; but whether the facts exist which constitute such a delivery and acceptance, is a question of fact for the jury. It is, therefore, a mixed question of law and fact, and must be left to the jury under the direction of the court.

In a case where an order was given for making a billiard table, it appeared the defendant, the maker, agreed to deliver it on a wharf, and when finished notified the plaintiff of his readiness. He replied he would give notice when a vessel was ready to take it, having, however, paid the price in the mean time, and refused to permit the defendant to sell to another party who was ready to buy it. Before it was put into the plaintiff's possession it was destroyed by a fire, and the plaintiff sued to recover the money paid. It was held that it was for the jury to decide whether there was a delivery, so as to vest the property in the plaintiff.⁵ Now it seems to us that, in this case, there was more properly a question of law, because the facts proved would show a constructive delivery.

¹ *Hatch v. Bates*, 54 Me. 136; *Church v. Gilman*, 15 Wend. 656; *Stephens v. Huss*, 54 Penn. St. 20; *Hatch v. Hatch*, 9 Mass. 307.

² *McKinney v. Rhoads*, 5 Watts, 343.

³ *Dearmond v. Dearmond*, 10 Ind. 191; *Lindsay v. Lindsay*, 11 Vt. 621; *Hurlburt v. Wheeler*, 40 N. H. 73.

⁴ 20 N. J. Law, 347. See *Perkins v. Deacon*, 13 Mich. 81. The question whether a deed was delivered as an escrow, is generally a question of fact. *White v. Bailey*, 14 Conn. 271.

⁵ *Weld v. Came*, 98 Mass. 152.

There was the payment, from which a presumption would arise; the notice to the plaintiff of the completion of the work; his reply virtually placed the table in the possession of the maker as his bailee. For it is a rule of law that an agreement of the vendor to hold the goods sold in storage for the vendee is equivalent to a delivery.¹ For these reasons it would appear to be a question of law as to whether there was a delivery.

§ 292. **Payment.**—On some occasions payment is required to be inferred from consent, and as this may be evidenced by many acts, it must then be a question of fact; but it is also obvious that there are certain acts from which the law will conclude a payment, and in these cases payment is a question of law. As in the case where a person *voluntarily* accepts a particular kind of money or other security. Cases of this character have lately arisen in reference to payment by Confederate currency.²

There is a numerous class of cases in reference to a payment by giving a promissory note or draft. It is generally held that the act of giving such note or draft is merely a presumption of payment; but it must be a question of fact whether it was intended as a payment.³

Where there is an agreed statement of facts, it will be a question of law whether a payment was made or not. Thus, in *Frost v. Martin*,⁴ it is held that the question whether evidence proves in law a payment, is not a question of fact for the jury, but a question of law to be determined by the court.

But questions in regard to payment very rarely come before courts on an agreed statement of facts; in the greatest number of instances, either a conflict as to acts or a dispute as to intention is found; and in these cases such matters are properly submitted to the jury as questions of fact. So,

¹ *Chapman v. Searle*, 3 Pick. 38.

² *King v. King*, 37 Geo. 205; *Caruthers v. Caruthers*, 38 Ibid. 75. See *Gibbons v. U. States*, 2 Ct. of Cl. 421; *Phillips v. Blake*, 1 Met. 156; *Alexander v. Byers*, 19 Ind. 301. It is error to refer to the jury what is "lawful money." *Chesapeake Bank v. Swain*, 29 Md. 483.

³ *Ward v. Bourne*, 56 Maine, 161; *Mehlberg v. Fisher*, 24 Wis. 607; *Doebbling v. Loos*, 45 Mo. 150; *Appleton v. Parker*, 15 Gray, 173; *Archibald v. Argall*, 53 Ill. 307; *Stone v. Miller*, 16 Penn. St. 450; *Schilling v. Durst*, 42 Penn. St. 136.

⁴ 29 N. H. 306.

when parties indebted to a bank execute a note not payable to the bank directly but to one of its officers; whether this operated as a novation, is a question of fact under instruction from the court.¹ So, where a party sued another, and a third person gave his note to the plaintiff.² So, whether the note of an individual partner was an extinguishment of the partnership debt;³ and so, whether notes were received on payment of an account or as collateral security.⁴

Whether an order on another person is taken as payment when the amount is collected, or is merely for collection, is a question of fact;⁵ so of payment on a mortgage debt;⁶ and whether money is a payment or a gratuity.⁷ There is no need to make further illustrations of the general principle stated; it will be found sufficient to enable us to decide such questions.⁸

Whether certain matters of discharge from a contract exist or not, is a question of fact; but when they are admitted, their effect on the contract is one of law for the court.⁹

§ 293. Usury. — It is a matter of law to declare what shall amount to usury; to say what the effect of admitted facts is, as to whether they tend to show usury or not.¹⁰ So it is said: "Where there is a controversy as to what the transaction is, the intention of the parties may have effect in determining its character; but where the fact and intention to do what was done are manifest, the law is only to be appealed to for the effects and consequences."¹¹ But it is seldom cases of usury are thus presented; they arise in connection with

¹ *Lyman v. U. S. Bank*, 12 How. (U. S.) 225.

² *Wilson v. Hanson*, 20 N. H. 375.

³ *Bennett v. Chamberlin*, 26 Conn. 487; *Comstock v. Savage*, 27 Conn. 184.

⁴ *Sellers v. Jones*, 22 Penn. St. 420.

⁵ *Stevens v. Thornton*, 26 Ill. 323.

⁶ *Barnes v. Brown*, 69 N. C. 439.

⁷ *Swain v. Etling*, 32 Penn. St. 486.

⁸ See, for other cases illustrative of the rule, *Indiana R. R. Co. v. Cavett*, 12 Ind. 316; *Bartlett v. Tarbell*, 12 Allen, 123; *Ewing v. Peck*, 26 Ala. 413; *Pierce v. Pierce*, 25 Barb. 243; *Small v. Smith*, 1 Denio, 583; *Johnson v. Weed*, 9 Johns. 310; *Bean v. Canning*, 2 E. D. Smith (N. Y.), 419.

⁹ *Burroughs v. Langley*, 10 Md. 248.

¹⁰ *Belden v. Gray*, 5 Fla. 504; *Fielder v. Darrin*, 50 N. Y. 437.

¹¹ *Tyler on Usury*, p. 104.

transactions that bear upon their face a *bond fide* appearance, but which may, nevertheless, be used to conceal the real purport of the parties. In such cases the usurious agreement, the *quo animo*, is to be ascertained from an examination of the facts in connection with the transaction, and then the question becomes properly one of fact.¹

In an English case it was said by Chief Justice Eyre: "I am of opinion that it never can be determined that any particular fact constitutes or amounts to usury till all the circumstances with which it was attended have been taken into consideration. . . . Common justice requires that the whole of the transaction should be before the jury, and should be taken fairly, with a just application of all the circumstances to every conclusion of fact which the evidence will warrant. . . . Whether more than the legal rate of interest be intentionally taken for the loan and forbearance of money, is a question of fact to be decided by the jury."²

"To be sure, in all such cases every circumstance by which a contract is assimilated to a loan bears the aspect of corruption, and has the tendency to reveal the *mala fides* of a usurious contract; but the question whether the contract is in substance a loan, disguised in shape to evade the law, or a *bond fide* contract of another species, belongs to the decision of the jury."³

§ 294. Negligence. — At the beginning of this chapter we drew attention to an important principle, that a rule of law is often evolved from a state of facts; and in reference to the doctrine of negligence, we shall find that the decisions will confirm and illustrate this statement. We cannot overlook the fact that our American cases on negligence are not harmonious; that what in one place would be decided as a question of law, will in another be submitted as a question of fact; what would be accounted negligence *per se* would elsewhere be doubtful, and would be referred to the jury as a

¹ Sumner v. People, 29 N. Y. 337; Horton v. Moot, 60 Barb. 27; Mix v. Insurance Co. 11 Ind. 117; Fleming v. Mulligan, 2 McCord, 173; DeForest v. Storey, 8 Conn. 513; Robbins v. Dillaye, 33 Barb. 77; Durant v. Banta, 3 Dutcher, 637; Bank v. Betts, 9 Bosw. (N. Y.) 552.

² Hammett v. Yea, 1 Bos. & P. 144.

³ Tyler on Usury, p. 100.

question of fact. Now, if we bear in mind the principle referred to, it will not be so difficult to arrange the decisions, and in some degree reconcile them. We shall observe, here especially, that what was considered a question of fact at one time was subsequently determined as one of law, because the frequent occurrence of the event under similar circumstances enabled the courts to decide it by a rule of law. It is in this manner that the law in reference to negligence *per se* has been established, which has of late taken a prominent place in our law.¹ Thus, to illustrate the evolution of this doctrine, whether one crossing a railroad track by omitting to look or listen for an approaching train, was guilty of negligence, was at first, when the question was novel, one of fact, now it is decided as a question of law, simply because its frequent recurrence enables us to apply a rule of law.²

Another example in point is the case, often happening, where one sustains an injury on a railroad, by putting his arm or elbow out of the car window. The law is becoming settled on this point, that an act of this kind will be declared negligence *per se*. The court, in *Pittsburgh, &c. R. R. Co. v. McClurg*,³ say that where a traveller puts his elbow or an arm out of a car window voluntarily, without any qualifying circumstances impelling him to do it, it must be regarded as negligence *in se*; and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law. This rule is now held in many places; but it is not agreed to generally.⁴

¹ Sir William Jones, in his work on Bailments, p. 122, speaking of the degrees of negligence of a bailee as depending upon an estimation of a diversity of circumstances, says: "On which circumstances it is on the Continent the province of a judge appointed by the sovereign, and in England, to our constant honor and happiness, of a jury freely chosen by the parties, *finally* to decide. Thus, when a painted cartoon pasted on canvas, had been deposited, and the bailee kept it so near a damp wall that it peeled and was much injured, the question 'whether the depositary had been guilty of *gross* neglect' was properly left to the jury, and on a verdict for the plaintiff with pretty large damages, the court refused to grant a new trial; but it was the judge who determined that the defendant was by *law* responsible for *gross* negligence only."

² *Chicago, &c. R. R. Co. v. Patten*, 64 Ill. 510; *Ernst v. Hudson, &c. R. R. Co.* 39 N. Y. 61; *Wilcox v. Rome, &c. R. R. Co.* Ibid. 358; *Butterfield v. R. R. Co.* 10 Allen, 532.

³ 56 Penn. St. 300.

⁴ It is held, as in the last case, to be a question of law in *Holbrook v. Utica, &c.*

§ 295. It is a question of mixed law and fact, where the evidence is in any way conflicting. On this proposition the cases are agreed. In a late case in Missouri it is held, "Although in many cases where the facts from which negligence is to be inferred are undisputed, the question of negligence is one of law to be passed upon by the court; yet, if the facts are disputed and the evidence conflicting, the question should always be left to the jury."¹ So, in New York it is held that where the evidence is irresistible, it is the duty of the judge to decide; but when facts or the inferences to be drawn from them are in any way doubtful, they should go to the jury under instructions.²

In a recent case in New York it is held that if some act or omission of the person injured of itself constituted negligence, it is the duty of the court to nonsuit the plaintiff; but if the fact depends upon the credibility of witnesses, or upon inferences to be drawn from the circumstances proved, about which honest men might differ, then it is the right of the plaintiff to have the question submitted to the jury.³

R. R. Co. 12 N. Y. 236; *Todd v. Old Colony R. R. Co.* 3 Allen, 18; *Indianapolis, &c. R. R. Co. v. Rutherford*, 29 Ind. 82; *Louisville R. R. Co. v. Lickings*, 5 Bush, 1; *Pittsburgh, &c. R. R. Co. v. Andrews*, 39 Md. 329. See, further, Wharton on Neg. §§ 360, 361. But in *Barton v. St. Louis, &c. R. R. Co.* 52 Mo. 253, there was evidence tending to show that the plaintiff had his arm outside the car window at the time of the accident, and the court held that this was not negligence *per se*; whether it contributed to the injury was a question for the jury. So, in *Chicago, &c. R. R. Co. v. Pondrom*, 51 Ill. 333, the plaintiff leaned on the window sill, and his arm was slightly out of the window, it was held as matter of law that this was not negligence *per se*. In *Spencer v. Milwaukee, &c. R. R. Co.* 17 Wis. 503, the court refused to charge that it was negligence, leaving the question to the jury. In this case the authorities are ably examined.

¹ *Owens v. Hannibal R. R. Co.* 58 Mo. 386; *Barton v. St. Louis R. R.* 52 Mo. 253.

² *Dickens v. N. Y. Cent. R. R. Co.* 1 Abb. App. Dec. 504; *Keller v. N. Y. Cent.* 2 Ibid. 480. It should be observed that the doctrine of contributory negligence is very strictly maintained in the New York courts; and what would there be treated as a question of law would elsewhere be submitted to the jury.

³ *Hackford v. N. Y. Cent. &c. R. R. Co.* 53 N. Y. 654. See, also, on this head, *Feler v. N. Y. Cent. &c. R. R. Co.* 49 N. Y. 47; *Cleveland, &c. R. R. Co. v. Crawford*, 24 Ohio N. S. 631; *Gagg v. Vetter*, 41 Ind. 228; *Baltimore, &c. R. R. Co. v. State*, 36 Ind. 366; *Eagan v. Fitchburgh, &c. R. R. Co.* 101 Mass. 315; *Penn. Canal Co. v. Bentley*, 66 Penn. St. 30; *Morrison v. Erie R. R. Co.* 56 N. Y. 302; *Oclaney v. Milwaukee, &c. R. R. Co.* 33 Wis. 67; *Stratton v. Staples*, 59 Me. 94; *Seigel v. Eisen*, 41 Cal. 109; *Anderson v. Steam Co.* 64 N. C. 399; *Lake Shore R. R. Co. v. Miller*, 25 Mich. 274; *Greenleaf v. Ill. Cent. R. R. Co.* 29 Iowa, 14;

§ 296. When a Question of Law. — It thus appears that the cases establish the distinction, that there is what is termed negligence in law and what may be inferred as matter of fact, depending upon an estimation of facts and circumstances peculiar to each case. We shall now endeavor to ascertain what the law declares of itself to be negligence. Some instances have already been referred to. It is obvious that there may be many cases when a court can declare what is negligence from given facts. In *Railroad Co. v. McElwee*,¹ the court say: "But when the standard is fixed, when the measure of duty is defined by the law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court. And so when there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as matter of law." So Redfield says: "What is proper care will often be a question of law where there is no controversy about the facts. But ordinarily, we apprehend, when there is any testimony tending to show negligence, it is a question for the jury."²

It is not, however, in all cases where the evidence is undisputed that negligence can be declared as a question of law. There may sometimes be nothing more to consider than the effect of a single act, when the court may easily declare negligence in law, because the conclusion is so irresistible that no honest mind could doubt it. For example, if a train should proceed over a thoroughfare without lessening its speed. But in other cases, even when the facts are admitted, there may be required a consideration of usage, ordinary course, or custom, and a comparison made as to the manner in which a person of ordinary prudence would act in such circumstances, all of which can be best determined by men of intelligence and experience in the affairs of life. So, it is held in *Detroit, &c. R. R. Co. v. Van Steinberg*,³ that when facts are disputed, or

Freemantle v. Lond. &c. R. R. Co. 10 C. B. N. S. 89; *Gerald v. Boston*, 108 Mass. 580; *Wharton on Neg.* § 420, and cases cited.

¹ 67 Penn. St. 315. See, also, *Railroad v. Stout*, 17 Wall. 659; *Riles v. Holmes*, 11 Ired. 16; *Catawissa R. R. Co. v. Armstrong*, 52 Penn. St. 282; *Boland v. Missouri R. R. Co.* 36 Mo. 484. Reasonable skill and due care of a physician is a question of law. *Woodward v. Hancock*, 7 Jones (N. C.), 384.

² 2 Redfield on Railways, p. 197.

³ 17 Mich. 99.

when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury.¹

§ 297. In cases of contributory negligence, the courts have more especially declared what shall constitute negligence so as to prevent a plaintiff recovering for injuries when his own want of precaution may have contributed thereto. Thus, an attempt to cross a railroad by going between two cars in motion has been held in law negligence;² so, leaving a train of cars after it had started;³ leaping from a train while in motion;⁴ and one who after the proper signals are given by a passing train, and while the flagman is upon the crossing waving his flag, is killed in attempting to rush his team across the track of a railroad in a highway, is guilty of such reckless and foolhardy misconduct that no recovery can be had for the injury.⁵

In *Filer v. New York Central R. R. Co.*,⁶ it is held that when the plaintiff, by his own fault, has contributed to the injury complained of, and the evidence is of such a character that a verdict for the plaintiff would be clearly against the evidence, the question is one of law, and should be decided by the court. But in this case, when the plaintiff had been injured by getting off a car in motion, it was held proper to submit the question to the jury, as there was evidence to show he was desired to get off by an employee, and that another passenger had alighted previously, suffering no harm. In this case the authorities were well examined. Many times questions concerning contributory negligence arise in connection with injuries to children; when it is sought to charge their guardians with negligence in permitting them to be unattended at the time of the injury; but it is held that these cases are properly submitted to the jury with instructions.⁷ This seems to be the

¹ The negligence of an attorney is a question of law. *Gambert v. Hart*, 44 Cal. 542.

² *Gahagan v. R. R. Co.* 1 Allen, 187; *Railroad v. Dewey*, 26 Ill. 255.

³ *Lucas v. R. R. Co.* 6 Gray, 64.

⁴ *Gavett v. R. R. Co.* 16 Gray, 501.

⁵ *Wild's Am'x v. Hudson, &c. R. R. Co.* 24 N. Y. 430.

⁶ 49 N. Y. 47. See, also, *Longmore v. R. R. Co.* 19 C. B. N. S. 183.

⁷ In *Oldfield v. N. York, &c. R. R. Co.* 3 E. D. Smith, 103, it is held, as a mat

more general and approved doctrine. However, the English decisions, as do those of Maine, Massachusetts, New York, and Indiana, hold the child to be chargeable with contributory negligence, as would be imputed to its parent or guardian in like circumstances.¹ The objection against this last view is, that it is impracticable as a rule of law, because the limit of age must be arbitrary. If it be negligence *per se* for a child of four years of age to be unattended on streets, why is it not in one of four years and six months, of five years, and so on? The safer way would be to submit it, with all the attendant circumstances, to the jury.²

§ 298. Negligence is a question of fact, whenever the evidence is conflicting, or, whenever facts being admitted, there might be a difference of opinion as to the conclusion to be drawn from them.

In an action against a town for an injury occasioned by a defect in a highway, the question, whether or not there was negligence, or want of ordinary care on the part of the plaintiff, is to be determined by the jury, under all the circumstances of the case.³

And whether a railroad company have been guilty of negligence in constructing their railroad too near a turnpike, which they are obliged to maintain, and without a screen between them, and whether this was a proximate cause of the injury

ter of law, not negligence for a child six or seven years of age to be in the streets unattended. So held of a child five years of age, in *Karr v. Parks*, 40 Cal. 188. See *Mangam v. R. R. Co.* 36 Barb. 236. The same was held in case of a child of eight. *Drew v. R. R. Co.* 26 N. Y. 49. But in other cases it has been held negligence as matter of law in the case of very young children. As a child of two years of age. *Hartfield v. Roper*, 21 Wend. 615. Two years and four months. *Callahan v. Bean*, 9 Allen, 557. Four years. *Glassey v. Hestonville, &c. R. R. Co.* 57 Penn. St. 172. See *McNamara v. N. P. R. R. Co.* 50 Cal. 581, where the question of contributory negligence was left to the jury. See, further, for cases, *Shearman & Red.* on Neg. § 48; *Wharton* on Neg. § 310.

¹ *Wharton* on Neg. § 311.

² See a late case in New York, where it was not negligence *per se* in a child of three years and six months to be on the street. *Ihl v. 42d St. R. R. Co.* 47 N. Y. 317; *Lynch v. Smith*, 104 Mass. 52. And in a case in Illinois, decided in 1875, the same doctrine is held, that it is proper to submit the question of contributory negligence to the jury. *Chicago, &c. R. R. Co. v. Becker*, 76 Ill. 25.

³ *Bigelow v. Rutland*, 4 Cush. 247. See *Gregory v. Inhabitants, &c.* 14 Gray, 242.

complained of in an action against them, are questions of fact.¹ So, where an action was for injury caused by fire from a locomotive, and it was proved that the engine was without appliances in use to prevent danger from sparks. But on behalf of the defendants it was shown by experts that the engine was constructed so as to dispense with these safeguards. The judge left it to the jury to say whether there had been negligence on the part of the company. This was held proper.² So, the precaution of providing cars with necessary modern improvements, as with safety beams to prevent damage by breaking of axles; and it is proper to submit to the jury to say whether, taking into consideration the vigilance required of common carriers, the publicity of the invention, and its prior use, the company were or were not guilty of negligence in not ascertaining the utility and necessity of the invention, and availing themselves of it.³

In cases of comparative negligence, it is held to be a question of fact to find the proximate cause of the injury; and in some places, which party is the most to be blamed. The latter doctrine prevails in Illinois.⁴

¹ *Moshier v. R. R. Co.* 8 Barb. 427.

² *Smith v. R. R. Co.* 19 N. Y. 130.

³ *Hegeman v. R. R. Co.* 16 Barb. 353.

⁴ *R. R. Co. v. Nunn*, 51 Ill. 76; *Delamatyr v. R. R. Co.* 24 Wis. 582; *Bateman v. Ruth*, 3 Daly, 378; *Lehigh, &c. R. R. Co. v. Hall*, 61 Penn. St. 361; *Snow v. R. R. Co.* 8 Allen, 441; *R. R. Co. v. Fielding*, 48 Penn. St. 318. The rule stated at the beginning of this section will be found to unite the cases, and it is needless to adduce cases at length. We shall, however, in this note refer to some other cases illustrative of the rule. In *Richmond v. Sacramento R. R. Co.* 18 Cal. 351, it was held to be for the jury to find the negligence of the plaintiff, whether it was directly contributory to the accident. Where plaintiff was run over in the street, it is held that unless the proof of negligence on his own part is so strong that the court would set aside a verdict in his favor as against the weight of evidence, it is not proper to take the question from the jury. *Williams v. O'Keefe*, 9 Bosw. (N. Y.) 536. In *Commonwealth v. R. R. Co.* 10 Allen, 189, it was held that if there was any evidence against the defendant, the case must be submitted to the jury. Where cattle are destroyed from want of cattle-guards to a railroad, which the company are under obligation to build, it is a question for the jury whether the owner was ordinarily careful. *Bulkley v. R. R. Co.* 27 Conn. 479. Whenever the defence is founded on some omission of a duty on the part of the plaintiff in not applying proper remedies for injuries sustained, what is proper care and treatment is a question of fact. *Maloy v. N. Y. Cent. R. R. Co.* 58 Barb. 182. Whether a railroad company, sued for negligence, have succeeded in repelling presumption of negligence arising from the circumstances, and in showing that the injury arose from accident, is a question of fact for the jury. *Boehm v.*

§ 299. *Necessaries.*—It is not practicable to lay down precise rules as to what are or not necessaries, in the case of infants and married women; the consequence is, that it cannot be determined on all occasions as a question of law. Yet we find that the courts in many instances decide, as matters of law, what may or may not be necessaries in certain circumstances;¹ for the needlessness of the articles furnished may be so apparent that no one could hesitate to pronounce them unnecessary.

In the case of *Freestone v. Butcher*,² Lord Abinger directed the jury to take into consideration the extravagance of a wife's orders, in considering whether her husband was chargeable on the ground of an implied agency, and their direction was followed and approved in a subsequent case of *Lane v. Ironmonger*,³ which was an action for £5,287 for certain articles of millinery supplied during part of one year. The English courts, in some instances, claimed a power to declare what were not necessaries, in cases which would now be submitted to a jury, as Lord Hale expressed it: "It shall not be left to a jury to dress my wife in what apparel they think proper."⁴

In the case of *Ryder v. Womball*,⁵ it was held to be a question for the court whether a pair of solitaires were necessaries; but this doctrine was lately disapproved in England in the case of *Genner v. Walker*,⁶ where Cockburne, C. J., said that

Great West. R. R. Co. 34 Barb. 256. The law not having fixed the rate of speed at which cars may run upon a railroad in and across city streets, it is generally a question of fact in each case whether the actual rate was excessive or dangerous. *Wild v. Hudson, &c. R. R. Co.* 29 N. Y. 315. Whether a creditor has been guilty of negligence in respect to collection of a demand transferred to him by his debtor as a collateral security, is a question of fact. *Buckingham v. Payne*, 36 Barb. 81. Questions arising in regard to the negligence of towns in omitting safeguards on streets, sidewalks, &c., are properly questions of fact. *Hall v. Manchester*, 40 N. H. 410; *State v. Canterbury*, *Ibid.* 315; *Williams v. Town of Clinton*, 28 Conn. 264; *Swift v. Town of Newbury*, 36 Vt. 355; *Hall v. City of Lowell*, 10 Cush. 260.

¹ In *St. John's Parish v. Bronson*, 40 Conn. 75, the court decided that a pew in a church was not a necessary for a married woman, and refused to submit the question to the jury. This was held no error.

² 9 C. & P. 647.

³ 13 M. & W. 366.

⁴ *Manby v. Scott*, 1 Sid. 122.

⁵ 17 L. T. Rep. N. S. 609.

⁶ 3 Am. L. R. 590.

"the correct view of the question was, that it is for the jury to say what articles are reasonably necessary with reference to the position of the infant." In the same case, Coleridge, J., aptly illustrated the impropriety of intrusting a decision to the judge. He remarked that "it would make the determination of these cases turn so much upon the individual tastes or ideas of the judges. For instance, as to smoking, Sir Benjamin Brodie vehemently objected to it; and perhaps a judgment against cigar cases might result from Baron Bramwell's disliking it. He meant no disrespect to that able and independent judge; on the contrary, in proportion to the originality and independence of a man's mind, might he naturally be disposed to determine cases upon his own ideas; whereas surely the safer course was to let a jury determine it."

The rule is now to submit the question of necessities to the jury, under instructions as to what the law considers necessities.¹ Thus, it has been held a question of law whether certain articles for which an infant is sued are within the definition of necessities; and, if so, whether those articles are suitable and necessary in the particular case, is a question of fact for the jury.² This gives the most approved statement of the law.

In *Mohney v. Evans*,³ it is held that what are necessities for either a married woman or a minor, is a question that is susceptible of no sharp definition, and is generally a question for the jury under all the circumstances of the case; but the court may in many cases pronounce authoritatively on the question, and withhold it from the jury. In *Jordan v. Coffield*,⁴ the court refused to decide as to whether a bridal outfit was necessary, but submitted it to the jury.

PART IV. WRITTEN INSTRUMENTS.

§ 300. *Their Effect.* — There is no rule of law better established than that the construction of a written instrument

¹ See 1 Parsons on Cont. 296. The court should in the instruction define what constitutes necessities. *McKanna v. Merry*, 61 Ill. 177.

² *Merriam v. Cunningham*, 11 Cush. 40. See *Davis v. Caldwell*, 12 Cush. 512.

³ 51 Penn. St. 80.

⁴ 70 N. C. 110. Whether articles in a passenger's trunk were necessary for the journey, is a question of fact. *Rawson v. Pennsylvania R. R. Co.* 2 Abb. Fr. N. S. 220.

is a matter of law for the court, which defines its terms, its signification and legal effect, from the language used and the context.¹ So, it is error for the court to allow the jury to construe an act of assembly;² so, to submit the question to the jury whether an instrument is a mortgage or not;³ so, whether an alteration is material or immaterial;⁴ and whether an instrument is or is not negotiable, except in new cases arising on account of doubt as to what is the law merchant.⁵

It is for the court to decide what are the letters and figures in a written instrument offered in evidence, and the meaning to be attached to them, and whether the instrument varies from the one described in the declaration.⁶

Where C., to support a claim as owner in fee, offered in evidence a patent issued to him, the court gave instructions to the jury, "That if they should find that the material facts stated in the petition, which facts are stated in the patent afterwards granted, are false and untrue, then that the patent granted to the said C. is null and void, and the plaintiff is not entitled to recover. It was held that the court erred in giving such instructions to the jury, because it was the exclusive province of the court to interpret all written instruments, and to determine the materiality and force of each and all the facts contained in them."⁷

¹ *Richmond, &c. Co. v. Farquar*, 8 Blackf. 89; *Holman v. Crane*, 6 Ala. 570; *Kidd v. Cromwell*, 17 Ala. 648; *Woodman v. Chesley*, 39 Me. 45; *Shepherd v. White*, 11 Tex. 346; *Bank v. Inloes*, 7 Md. 380; *Addington v. Etheridge*, 12 Gratt. 436; *Bovill v. Pimm*, 36 Eng. L. & Eq. 441; *Brown v. Huger*, 21 How. (U. S.) 305; *Cox v. Freedley*, 33 Penn. St. 124; *Estes v. Boothe*, 20 Ark. 583; *Carpentier v. Thiston*, 24 Cal. 268; *Rogers v. Carey*, 47 Mo. 235.

² *Clarke v. Marriott*, 9 Gill, 331; *Charlotte v. Chouteau*, 25 Mo. 465. Whether a statutory clause is directory or imperative is a question of law. *Board v. Heenan*, 2 Minn. 330. See *Mattus v. Shields*, 2 Met. (Ky.) 553.

³ *Smith v. Jones*, 13 Ired. 442. But the jury may determine what property is included in a real estate mortgage. *Shamokin R. R. Co. v. Livermore*, 47 Penn. St. 465. Whether a conveyance is a mortgage, is a question of fact to be inferred from intention. *Horne v. Pickett*, 22 Tex. 201.

⁴ *Burnham v. Ayer*, 35 N. H. 351.

⁵ *Myers v. R. R. Co.* 43 Maine, 232.

⁶ *Riley v. Dickens*, 19 Ill. 29. So, whether a sale was by the acre or by the gross, is a question of law depending upon the construction of the deed or contract. *Gardner v. Stell*, 34 Tex. 561. When the construction of a note or receipt could in any way be changed by parol evidence, the question would be one for a jury. *Inkster v. Bank*, 30 Mich. 143.

⁷ *Cook's Lessee v. Carroll*, 6 Md. 104.

The respective duties of the court and jury were well stated in a case in Rhode Island, where it is said to be the duty of the court, in a case calling for it to instruct the jury what inferences may be legally drawn from a written document; the legal sufficiency of proof being a question of law, the moral weight being for the jury.¹ And where some of the terms in which a contract is expressed are words of science or art which require the evidence of experts to explain, the jury, of necessity, must pass upon the meaning of those words; but being ascertained by them, the construction of the contract is then a question of law.² The question, whether letters testamentary are properly authenticated or not, is for the court.³ So mining laws, when introduced in evidence, are to be construed by the court, and the question, whether by virtue of such laws a forfeiture has accrued, is a question of law and cannot be submitted to a jury.⁴

§ 301. It is a question of fact, when the meaning and construction are doubtful and depend upon extrinsic evidence; as when the intention is to be learned from facts and circumstances which the jury are to determine, but under the instruction of the court as to the effect of the language as explained by such facts or circumstances.⁵ So, where a vote of a proprietary was introduced as evidence, without objection, the judge should instruct as to the effect of such vote; but should any question arise as to the terms of the vote, that fact must be determined by the jury.⁶ So, where the question whether a contract was joint or not depends not only upon several instruments, but also upon oral testimony, it should be left to the jury.⁷

Where instruments are introduced explanatory of another, it is the province of the court to construe them; but their

¹ *Wheeler v. Schroeder*, 4 R. I. 383.

² *Silverthorne v. Fowle*, 4 Jones Law (N. C.), 362; *Brown v. Brown*, 8 Met. 576.

³ *Sullivan v. Honacker*, 6 Fla. 372.

⁴ *Fairbanks v. Woodhouse*, 6 Cal. 433.

⁵ *Edelman v. Yeakel*, 27 Penn. St. 26; *Guptill v. Damon*, 42 Me. 271; *Morse v. Weymouth*, 28 Vt. 824. The jury are bound to accept the construction put on the words of a will by the court. *Downing v. Bain*, 24 Geo. 372.

⁶ *Yeaton v. Yeaton*, 36 Me. 248.

⁷ *Bradford v. R. R. Co.* 7 Rich. (S. C.) 201.

weight in evidence is a question of fact for the jury.¹ Thus, in a case in Missouri, it is said by the court: "The legal effect of papers is to be determined by the court; but when documents are offered in evidence as the foundation of an inference of fact, whether such inference can be drawn from them is a question for the jury."²

So, the jury may have submitted to them, as a question of fact, the meaning of certain phrases or words, whose signification is not familiar or definite, when explanation or evidence is required as to their import. As where a contract used the phrase "soft English lead," it was held not to be error when it was left to the jury to find whether this meant what was known in commerce as soft lead made in England from whatever ore;³ so what is an "appurtenance" of a steamboat;⁴ and so the word "fairly," when used in reference to the manner of working a mine, was left to the jury, the court, however, expressing an opinion as to its import.⁵

The word "fixtures" has a legal signification, but whether certain property was to be so regarded by the parties in a contract or not, is a question of fact, when it depends upon intention.⁶

"Cruel treatment," and "ill-usage," are questions of fact under instructions.⁷

§ 302. In reference to Contracts especially. — When the contract is in writing, it comes under the general rule, that its construction is a question of law; and when an oral contract is proved, its terms when explicit must be construed by the court.⁸ However, when there is a doubt as to the lan-

¹ *Reynolds v. Richards*, 14 Penn. St. 205; *McKean v. Wagenblast*, 2 Grant (Pa.), 462.

² *Primm v. Haren*, 27 Mo. 205.

³ *Pollen v. Le Roy*, 30 N. Y. 549.

⁴ *Amis v. Steamboat*, 9 Mo. 621.

⁵ *Griffiths v. Rigby*, 37 Eng. L. & Eq. 519.

⁶ *Voorhis v. McGinnis*, 48 N. Y. 278; *Curry v. Schmidt*, 54 Mo. 515; *Grand Lodge v. Knox*, 27 Ibid. 315.

⁷ *Erving v. Ingram*, 4 Zab. 520; *Byrne v. Byrne*, 3 Tex. 336. For other examples, see *Berry v. Billings*, 47 Me. 328; *Martin v. Cope*, 28 N. Y. 180; *Darling v. Dodge*, 36 Me. 370; *Savignac v. Garrison*, 18 How. (U. S.) 136; *Russell v. Dyer*, 40 N. H. 173.

⁸ *Short v. Woodward*, 13 Gray, 86.

guage, what terms were used, and how it was understood, are questions of fact.¹ So, whether a contract was made or not, is a question of fact; but what it means, a question of law.² When the law implies a contract for services rendered, there can be no question of fact as to the existence of a contract.³

The question, whether a purchaser of land contracted for it with reference to its condition in respect to other land of his vendor, is one of fact.⁴

Where a contract is sought to be altered or affected by a subsequent agreement, either by parol or by writing, the terms of the latter agreement, and how far it was intended by them to affect the former contract, are all properly questions of fact for the jury.⁵ So, it is for the jury to determine whether a written contract is established by parol proof;⁶ so, as to the rights arising out of a contract when the evidence is conflicting.⁷

§ 303. The validity of a contract is a question of law. So, whether a contract is void because against public policy, for want of consideration, for being made on a Sunday, or because in violation of a statute, are all properly questions of law.⁸

In Iowa it is held to be a question of fact, whether the consideration in a written agreement renders it void by being a wager contract.⁹ But in this case the rule is not infringed, because there was a question as to intention, which was properly decided as a question of fact, under instruction as to what

¹ *Kingsbury v. Buchanan*, 11 Iowa, 398; *Folsom v. Plumer*, 43 N. H. 469; *Winship v. Buzzard*, 9 Rich. (S. C.) 105; *Kuns v. Young*, 34 Penn. St. 60.

² *Latham v. Westervelt*, 26 Barb. 256; *Smalley v. Hendrickson*, 5 Dutcher, 373; *Judge v. LeClaire*, 31 Mo. 127.

³ *Prickett v. Badger*, 37 Eng. L. & Eq. 428.

⁴ *Curtis v. Ayrault*, 47 N. Y. 73.

⁵ *Cobb v. Wallace*, 5 Coldw. 540; *Sellers v. Johnson*, 65 N. C. 104; *Martin v. Angell*, 8 Barb. 407; *Edwards v. Goldsmith*, 16 Penn. St. 47; *Coleman v. Clements*, 23 Cal. 245.

⁶ *Stake v. Burrill*, 3 Grant (Pa.), 241.

⁷ *Fuller v. Bradley*, 25 Penn. St. 120.

⁸ *Chapin v. Potter*, 1 Hilt. (N. Y.) 366; *Pierce v. Randolph*, 12 Tex. 290; *Culver v. Banning*, 19 Minn. 303; *Heller v. Crawford*, 37 Ind. 279; *Fowler v. Scully*, 72 Penn. St. 456.

⁹ *Craig v. Andrews*, 7 Clarke, 17.

the effect of a wager contract would be. In Alabama it was held to be a question of fact to determine whether the making of a contract was justifiable or not in order to determine its validity.¹

§ 304. The performance of a contract, as a matter of fact, must be submitted to the jury; but when the performance depends upon certain terms used in the contract, it is a question of law as to the completion. Thus, the meaning of the phrase in a building contract, "when the walls shall be completed," is a question of law; whether the necessary acts were done, is a question for the jury.²

Under a contract for the sale of wood, subject to the measurement of a third person, the buyer is entitled to such actual measurement; and this third person having testified that he measured the wood by his eye alone, the buyer will not be bound by such measurement, unless his eye is established to be as reliable as a measuring rod; and this is a question of fact for the jury.³

Where a parol contract was to deliver a certain number of barrels, but no capacity was specified; it was held a question of fact whether the contract was performed by a delivery of a less number of vessels, of a greater capacity than the statute barrel, when no instruction was asked that in the absence of a standard of measurement fixed by the parties the statute standard should govern.⁴

§ 305. Boundaries of land as described in deeds may sometimes be submitted as a question of fact when the terms of description are equivocal. It is therefore for the jury to determine to what piece of land a description in a deed refers.⁵ And when the calls of a survey are all ascertained, and no resort to extrinsic evidence is necessary, it is for the court to fix the boundary; but where parol evidence must be resorted to,

¹ *Hooper v. Edwards*, 18 Ala. 280.

² *Worcester Med. Inst. v. Harding*, 11 Cush. 285; *Dodge v. Rogers*, 9 Minn. 223.

³ *McAndrews v. Santee*, 7 Abb. Pr. N. S. 408.

⁴ *Cullum v. Wagstaff*, 48 Penn. St. 304.

⁵ *Naglee v. Ingersoll*, 7 Barr, 185; *Reynolds v. West*, 1 Cal. 322; *Ferris v. Coover*, 10 Ibid. 622; *Schultz v. Lindell*, 40 Mo. 330.

the facts must be ascertained by a jury.¹ So, where a testator lays down a line of division "to a post, a corner, &c.," and there are two such posts, the will being indefinite as to which is meant, it is a question of fact to ascertain the one intended.²

The true rule is, that whenever the location can be ascertained from the instrument, the question must be decided by the court; but whenever the facts which determine the boundaries have to be ascertained, or disputes settled, the matter becomes proper for the jury. Even when the facts are ascertained by the jury, it is then a question of law, to declare what the boundaries are that control the location.³ It has lately been held in North Carolina, that if "the judge below leaves such question to the jury, and they find the law as his honor ought to have held, no advantage can be taken of his honor's charge."⁴

Questions regarding the line of a survey or its deviation are appropriately submitted to the jury. As whether the courses and distances carry the lines to certain points claimed by a party in the cause, is not a question of construction, but a question of fact for the determination of a jury.⁵ So, where the evidence as to the identity of a line belonging to another tract, called for in a deed, is unsatisfactory, and to reach it requires a great departure from the course and distance, it was held to be error to instruct the jury that the course and distance should be abandoned, and that the line was called for, and must be adhered to.⁶ And so whether a marked corner, made at the time the deed was made, but not called for by name, was intended to be adopted in the deed, or whether it was intended by the vendor that course and distance should prevail, is a question of fact, and should be left to the jury with proper instructions.⁷

¹ *Ott v. Soulard*, 9 Mo. 581. To the same purpose, *Ramage v. Peterman*, 25 Penn. St. 349; *Hypfner v. Walsh*, 3 Iowa, 509.

² *Brownfield v. Brownfield*, 12 Penn. St. 136. See, to the same purpose, *Hill v. Mason*, 7 Jones Law (N. C.), 551; *Robinson v. White*, 42 Me. 209; *Dobson v. Finley*, 8 Jones Law (N. C.), 495.

³ *Whittlesly v. Kellogg*, 28 Mo. 404; *Brown v. Willey*, 42 Penn. St. 205; *Hecker v. Sterling*, 36 Penn. St. 423; *Moss v. Shear*, 30 Cal. 467.

⁴ *Johnson v. Ray*, 72 N. C. 273. This principle has saved other verdicts in that State. *Brock v. King*, 3 Jones Law, 504; *Woodbury v. Taylor*, 3 Ibid. 504.

⁵ *Opdyke v. Stephens*, 4 Dutcher, 83.

⁶ *Rodman v. Gaylord*, 7 Jones Law (N. C.), 262.

⁷ *Safret v. Hartman*, 5 Ibid. 185. In the various cases there is nothing more

§ 306. Questions of title arising from written instruments are for the jury, on the same principle as in relation to boundaries, that is, when it cannot be determined from the words of the instrument without a resort to extrinsic proof.

But whenever the title can be inferred from the instrument, it is error to submit it to the jury as a question of fact. As to submit whether a mortgage has been properly executed and acknowledged;¹ the due execution of a chattel mortgage;² as to who holds title from certain deeds introduced in evidence;³ and the validity of a mortgage where the mortgagor of chattels reserved an interest to himself.⁴

But in case evidence has to be received to make the title definite, to point out more certainly who is included in an instrument conferring title, then the question becomes properly one of fact. As whether circumstances, concurring with long peaceable possession, prove a presumed existence of a lost deed, or presumption of title from possession alone.⁵ So, where a father, his son having the same name, purchased a piece of land, and took the deed in the name of D. F., Jr., giving his residence in the town where both resided, and gave notes executed by himself and a mortgage to secure the purchase-money, by the name D. F., Jr., but did not disclose the fact of his agency, and the grantor believed he sold directly to the father. Evidence was given tending to show an authority from the son to the father, and that the son directly

than an illustration of the general principle, that when the terms of a deed are doubtful by reason of some ambiguity which appears by *other* evidence, it is proper to submit the question as one of fact to the jury to determine. Thus, where a lease used the words "coal-bank and the appurtenances thereunto belonging," but the boundaries were not otherwise described, it was held, in an action for rent, that it was for the jury to say what was the extent of the demise, it being a latent ambiguity to be solved rather than an instrument in writing to be construed. *Tiley v. Moyers*, 43 Penn. St. 404. So, in a case where it is doubtful how much land passed at a sheriff's sale. *Hoffman v. Danner*, 14 Penn. St. 25. If the written instrument affords no means to fix the boundaries in any way, it is void for uncertainty. *Archibald v. Davis*, 4 Jones (N. C.), 138. When land was described in a will as the Red House Tract, what that tract was, and its limits, was held to be a question of fact. *Baynard v. Eddings*, 2 Strobb. 374. See *Symmes v. Brown*, 13 Ind. 319; *Bell v. Woodward*, 46 N. H. 315.

¹ *Bullock v. Narrott*, 49 Ill. 62.

² *Flynn v. Hathaway*, 65 Ill. 462.

³ *State v. Delong*, 12 Iowa, 453.

⁴ *Spies v. Boyd*, 1 E. D. Smith, 445.

⁵ *Baird v. Wolfe*, 4 McLean (U. S.), 549; *Taylor v. Watkins*, 26 Tex. 688.

or indirectly paid the whole price of the property. The question was left to the jury to determine who was the real purchaser in the transaction.¹

The acceptance and dedication of property to public use is a question for the jury, though what acts shall be sufficient to show such must be a question of law. So, whether a dedication of a bridge to the public was accepted is a question of fact.² And where the court charged the jury that the evidence, if true, would authorize them to find a certain road had been dedicated to the public use, and could not be lawfully obstructed by any one under claim of title to land, it was held error when the proof of dedication is only circumstantial.³ This case would scarcely be accepted elsewhere as sound law; for it is an undeniable principle of law, that what shall constitute a dedication is a question of law; and it is for the jury to find the proof of such facts. But as this was an indictment for stopping a highway, it may have inclined the court to strict proof of dedication.⁴

¹ *Prentiss v. Blake*, 34 Vt. 460.

² *Highway Comrs. v. Highway Comrs.* 60 Ill. 58; *Daniels v. People*, 21 Ill. 443.

³ *Sultzner v. State*, 43 Ala. 24.

⁴ It is a question of fact to infer intention to dedicate a street from circumstances. *Wilder v. City*, 12 Minn. 190. Acts of an open, explicit character by the owner, as well as by the public, will establish a dedication, even before the period of limitation. *Connehan v. Ford*, 9 Wis. 242. Where premises are demised or conveyed with "right of way thereto," what is reasonable use of this right is a question of fact. *Hawkins v. Carbines*, 3 Hurl. & N. 910. In an action of trespass, the defence was that the way was a by-road, and whether it was so or not is a question of fact. *Van Blarcom v. Frike*, 5 Dutcher, 517.

CHAPTER VIII.

PROVINCE AND DUTY OF THE COURT.

§ 306a. Need of the Distinction.

PART I. PROVINCE AND DUTY GENERALLY.

- § 307. General Summary.
- § 308. Admissibility of Evidence.
- § 309. Application of Rule as to Admissibility.
- § 310. When the Court decides upon Facts.

PART II. INSTRUCTIONS.

- § 311. The Purpose of Instructions.
- § 312. Issues raised by the Pleadings.
- § 313. Instructions should be confined to the Issues.
- § 314. Abstract Instructions.
- § 315. Hypothetical Facts — Instructions on.
- § 316. Assuming Facts as proved.
- § 317. When not Error.
- § 318. The Error is not cured by Correct Statement of the Law.
- § 319. Instructions that single out Particular Facts.
- § 320. The grouping of Particular Facts.
- § 321. Instructions on the Sufficiency of Evidence.
- § 322. Commenting on the Weight of Evidence.
- § 323. When Error.
- § 324. Not unless prejudicial to a Party.
- § 325. The Law given by the Court.
- § 326. On Presumptions of Law and Fact.
- § 327. In reference to Criminal Cases.
- § 328. As to the Grade or Character of the Offence.
- § 329. Charging Distinct and Separate Offences.
- § 330. Nature and Amount of Evidence.
- § 331. As to Express or Implied Malice.
- § 332. As to Reasonable Doubt.
- § 333. Use of the Term.
- § 334. Erroneous Application.
- § 335. Application of the Term in Civil Cases.
- § 336. Suggesting Certain Inferences.
- § 337. Requests to charge.
- § 338. Obscurity in Language of Request.
- § 339. Modifying Instructions prayed for.
- § 340. Requests denied, being a Repetition.

- § 341. Instructions in relation to Damages.
- § 342. In reference to Compensatory Damages.
- § 343. In reference to Exemplary Damages.

PART III. MODE OF GIVING INSTRUCTIONS.

- § 344. Reading Extracts.
- § 345. Conflicting or Inharmonious Instructions.
- § 346. Uncertain or Ambiguous Instructions.
- § 347. Long and Verbose Instructions.
- § 348. To be given in Open Court.
- § 349. Written Instructions.
- § 350. Application of the Rule.

PART IV. DIRECTING A VERDICT.

- § 351. Grounds on which exercised.
- § 352. When directed.
- § 353. Directing a Verdict in a Criminal Case.
- § 354. A Proper Test as to directing a Verdict.
- § 355. When it is Error.
- § 356. May be directed under a Hypothesis.
- § 357. In Cases of Contributory Negligence.

PROVINCE AND DUTY OF THE COURT.

§ 306*a*. Need of the Distinction. — The respective duties of the judge and jury have at all times occasioned much discussion. Even now it is not generally agreed where the limit of the authority of the one and the power of the other is to be placed; what shall, in some matters, be appropriately committed to one and withheld from the other. The previous chapter gave decisive evidence as to this uncertainty. And yet we must have some clear distinction, if ever the efficiency and integrity of our judicial system are to be maintained.¹ Those who have carefully studied this system have repeatedly pointed out the necessity of keeping each in its appropriate sphere, as the certainty and fixedness of our law, as well as the utility of the jury system, depend upon the separation between the duties of the judge and those of the jury. Where the judges have usurped the province of the jury in other countries, the jury has been undermined, and abolished in the

¹ In a late case it is said: "The line between the duties of a court and a jury is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. In this way court and jury are made responsible, each in its appropriate department, for the part taken by each, and in this way alone can errors of fact and errors of law be traced to their proper sources." *State v. Smith*, 6 R. I. 34.

end; and, on the other hand, when the power of the judge has been invaded by the jury, law becomes subject to popular prejudice and caprice, liable to vary with the ephemeral current of public feeling and passion.

PART I. PROVINCE AND DUTY GENERALLY.

§ 307. *General Summary.* — Without at present examining into the authority and duty of the court as instituted in early times, we may say that, in general, the duties of the judge presiding at the trial are threefold:

1. To decide upon the admissibility of evidence.
2. To declare the rules of law affecting this evidence, as to its character and legal effect.
3. To expound the general rules of law applicable to the point at issue.

In some States we shall find another duty devolving upon the judge at a trial, that is, to decide upon the competency of jurors, of which mention has already been made in a previous part of this work.

The first of these duties is discharged at the time of the production of the testimony; the second and third are included under the general head of instructions, the most serious and important duty devolving upon a judge.

§ 308. *Admissibility of Evidence.* — There is no question whatever that it is the province of the court to determine the admissibility of evidence, and to decide upon the competency of witnesses. But as the various disabilities that formerly rendered witnesses incompetent to testify on a trial, have in late times been to a great extent removed, this question will not be presented very often to the court. However, when on the ground of some relationship, or of a disqualification for crime, it is sought to exclude a witness, it must be submitted to the court for its determination.¹

So the judge is to determine the mental capacity of a witness, in order to ascertain his competency. Thus, where the question was whether a witness was competent on the ground of sanity, Parke, J., after taking the opinion of the judges,

¹ Cook v. Bennett, 51 N. H. 85.

tried the question of sanity, and admitted the witness.¹ So the court is to judge whether a witness has sufficient capacity to appreciate the obligation of an oath or the penalty for false swearing.² And it must decide whether a person be an agent, in order to let in evidence to bind the principal, and even if it be afterwards a question for the jury in order to settle an issue in the cause.³ But the court cannot admit a witness and then instruct the jury to disregard his testimony, if they think him disqualified.⁴

There is an exceptional ruling in a case in New Hampshire,⁵ where the question of interest was referred to the jury in order to determine the competency of a witness. This case is contrary to the English authorities above cited, and is not according to principle.⁶

The judge must try whether a person whose declarations on a question of pedigree are tendered in evidence is proved to have been a member of the family.⁷

§ 309. Application of Rule as to Admissibility. — The court decides as to the legal character of a document in order to admit it in evidence, and also whether it comes from the right custody.⁸

So, where a confession is made, it is the duty of the court to decide whether it was voluntary or made under compulsion, in order to determine whether it shall be admitted.⁹ Also, whether a person was *in articulo mortis*, in order to admit a dying declaration.¹⁰ So, whether a communication is protected on the ground of its being confidential.¹¹

Whether different portions of land are so connected as to

¹ *Cleave v. Jones*, 21 L. J. Ex. 106. So in *Holcomb v. Holcomb*, 28 Conn. 117.

² *Duncan v. Wetty*, 20 Ind. 44; *Peterson v. State*, 47 Geo. 524; *People v. Bernal*, 10 Cal. 66.

³ *Doe v. Davies*, 10 Q. B. 322; *Welstead v. Levy*, 1 M. & R. 138.

⁴ *Tabor v. Staniels*, 2 Cal. 240.

⁵ *Rich v. Eldredge*, 42 N. H. 153.

⁶ See *Doe dem. Jenkins v. Davies*, 10 Q. B. 323; *Lewis v. Marshall*, 7 M. & G. 743; *Harris v. Wilson*, 7 Wend. 57.

⁷ *Doe v. Davies*, *supra*.

⁸ *Bartlett v. Smith*, 11 M. & W. 483; *Doe v. Keeling*, 11 Q. B. 89.

⁹ *Nicholson v. State*, 38 Md. 140; *Carter v. State*, 37 Tex. 362; *Rex v. Hucks*, 1 Starkie, 523 (n.).

¹⁰ *Bartlett v. Smith*, *supra*.

¹¹ *Cleave v. Jones*, 7 Exch. 421.

make acts done upon one of them evidence of rights over another, and whether such acts amount to evidence of ownership, is for the court to decide.¹

Where witnesses were called to give evidence as to a general usage in trade, and the judge, thinking that their testimony amounted to no more than evidence of opinion, withdrew it from the jury, and this was held a proper course to take.² In general, the judge merely decides whether there is *prima facie* any reason to present evidence to the jury.

§ 310. The court decides facts when necessary to the introduction of evidence. The determination of the competency of a witness, or the admissibility of certain evidence, may often depend on disputed facts, and before the witness can testify, or the evidence be admitted, these facts need to be determined, which the court, in this instance, must do in order to admit the evidence.

Thus, if proof be offered of the signature of an attesting witness, and the admissibility of this evidence turns on the fact whether or not the witness has not through some collusion voluntarily absented himself, it is for the court to determine this fact.³

So facts and testimony may be considered by the court alone to aid it in construing a written document, to determine the relevancy of evidence, or to ascertain the relationship of the parties.⁴

And where the reception of a deposition in evidence depends upon the inability of the deponent to attend the trial, the fact of the witness being incapable to attend must be proved to the satisfaction of the judge.

The preliminary facts necessary to admit secondary evidence must be decided by the court.⁵ But it has been held where the loss of the instrument is at all involved in the issue, and is not only a preliminary fact to decide upon the admis-

¹ *Doe v. Kemp*, 7 Bing. 336.

² *Lewis v. Marshall*, 7 M. & G. 743.

³ *Egan v. Larkin*, 1 Arm., M. & O. 403.

⁴ 1 Greenl. Ev. § 281.

⁵ *Bartlett v. Smith*, 11 M. & W. 486, per Alderson, B.; *Glassell v. Mason*, 32 Ala. 719; *Poulet v. Johnson*, 25 Geo. 403; *Adams v. Leland*, 7 Pick. 62; *Woods v. Gassett*, 11 N. H. 442; *Woodworth v. Barker*, 1 Hill (N. Y.), 172.

sibility of secondary evidence, it is for the jury to determine the loss.¹

So, when preliminary testimony is introduced as to whether a confession was voluntarily made or not, it is submitted to the court, who will pass upon it to determine the admissibility of the evidence.²

PART II. INSTRUCTIONS.

§ 311. The purpose of instructions is to give to the jury a statement of the law applicable to the particular case, to declare what presumptions of law are applicable to the facts, and to declare the legal effect of certain evidence. The object is thus pointed out in a Kansas case: "The purpose of an instruction is to assist the jury in correctly applying the law to the facts of the case; and it not unfrequently happens that a general statement of the rights and obligations of the parties to a transaction assists materially to a clear understanding of the particular obligation claimed to have been violated."³ And the instructions must be predicated upon the whole evidence; it will not do to state abstractly general principles of law, to state the law upon any isolated fact in the case to the exclusion of other facts which are in evidence.⁴ This defect in a charge to the jury was pointed out in *Morris v. Platt*,⁵ and a new trial was granted for this and other errors. The court say: "The charge as given informed the jury what 'the great principle' of the law of self-defence is, and correctly, but that was not all to which the defendant was entitled. . . . When the facts are admitted, or proved, and found, it is for the court to say what the law as applicable to them is." So, in another case it was held error for the court to instruct the jury in regard to a single fact, as *all* the facts should be taken under consideration.⁶

¹ *Coleman v. Walcott*, 4 Day (Conn.), 388; *Des Arts v. Leggett*, 5 Duer, 156; *Swearingen v. Leach*, 7 B. Mon. 285.

² *State v. Fidment*, 35 Iowa, 541. It is error to leave to the jury the decision of a fact on which the admissibility of evidence depends. *State v. Dick*, 1 Wins. (N. C.) 45.

³ *Sawyer v. Sauer*, 10 Kans. 470.

⁴ *Barker v. State*, 48 Ind. 163; *Zabriskie v. Smith*, 13 N. Y. 322.

⁵ 32 Conn. 75.

⁶ *First Nat. Bk. v. Currie*, 44 Mo. 91. See *Balt. & Ohio R. R. Co. v. Beasley*, 14 Md. 424.

Even if not requested by either party, it is the duty of the court to give the instruction to the jury. But the omission of a judge to charge upon a particular aspect of a case is not error.¹

§ 312. *Issues raised by the Pleadings.* — The first and most obvious duty of the court is to inform the jury as to the nature of the action, and the material issues as inferred from the pleadings, whose construction is within the province of the court.² And it is the duty of the court to separate the material from the immaterial statements in the bill, so as to present the real substantial issues to the jury, and a general charge that all the plaintiff's statements must be supported by the proof, is calculated to mislead the jury.³

Thus, in a civil action, where a criminal act is so set out in the pleadings as to raise that distinct issue before the jury, it is in some places held to be the duty of the court to draw attention to such issue, to instruct that the crime charged must be proved beyond a reasonable doubt before the plaintiff is entitled to a verdict.⁴ So the jury is to be instructed as to what facts are admitted in the pleadings, this being exclusively the duty of the court.⁵

§ 313. *The instructions should be confined to the issues,* is a leading cardinal rule.⁶ The court say, in *Little Miami R. R. Co. v. Wetmore*:⁷ "The charge ought not only to be correct, but to be so adapted to the case and so explicit as not to be misconstrued or misunderstood by the jury in the application of the law to the facts as they find them from the evidence."

¹ *Owen v. Owen*, 22 Iowa. 270; *Bain v. Doran*, 54 Penn. St. 124; *Express Co. v. Kountze*, 8 Wall. 342.

² *Pharo v. Johnson*, 15 Iowa, 560; *McKinney v. Hartman*, 4 Ibid. 154; *Dassler v. Wisley*, 32 Mo. 498. It is the province of the judge at *nisi prius* to state to the jury the claim set up by each of the parties as disclosed by the evidence. *Grout v. Nicholls*, 53 Me. 383.

³ *McLean v. Clark*, 47 Geo. 24; *Camp v. Phillips*, 42 Ibid. 289.

⁴ *Sinclair v. Jackson*, 47 Me. 102. But this is not held generally. See a further examination of this subject, § 384.

⁵ *Tevis v. Hicks*, 41 Cal. 123.

⁶ *Nolen v. Wisner*, 11 Iowa, 190; *King v. King*, 37 Geo. 205; *Miles v. Douglas*, 34 Conn. 393; *Hill v. Canfield*, 56 Penn. St. 454; *Hooker v. Johnson*, 6 Fla. 630. 19 Ohio N. S. 110.

So it is held when instructions are asked upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to give such instructions.¹

And where the court instructed the jury that if they believe that any of the witnesses swore falsely and corruptly, they had a right to disregard the evidence of such witness entirely, it was held that this was erroneous, because it did not confine the jury, in their estimate of the falsity of a witness, to the evidence adduced on the trial, nor to the manner and demeanor of the witness while testifying; nor to any circumstance apparent upon the examination, but allowed them to indulge their suspicions, and even to act upon their own private information.²

§ 314. *Abstract Instructions.* — A charge not pertinent to the issue may therefore be refused when requested by counsel, no matter how correctly that request may state a principle of law.³ And when the charge given is not pertinent to the issue, it is held to be error, especially if it tends to mislead the jury.⁴

Thus, it was held improper for the court, on the trial of an action for a false warranty of soundness in a slave, and where the defect complained of was secret and internal, to instruct the jury that if the disease was plain and palpable at the time of the sale it is not embraced in the warranty.⁵

But where, in an action for seduction, the court charged the jury that, in estimating the plaintiff's damages, they should

¹ *State v. Dunlop*, 65 N. C. 288. See *Express Co. v. Parsons*, 44 Ill. 312; *Payne v. Green*, 10 Sm. & M. 508.

² *Lavenburg v. Harper*, 5 Cush. (Miss.) 299.

³ *Loring v. Willis*, 4 How. (Miss.) 383; *Rice v. People*, 38 Ill. 435; *Leaptrot v. Robertson*, 44 Geo. 46; *Butter v. Rickets*, 12 Iowa, 107; *Tisdale v. Ins. Co.* 28 Ibid. 12; *Knight v. Clements*, 45 Ala. 89; *Golding v. Merchant*, 43 Ibid. 705; *Kissenger v. R. R. Co.* 56 N. Y. 538; *People v. Rogers*, 13 Abb. Pr. N. S. 370; *State v. Murphy*, 33 Iowa, 270; *State v. Arthur*, 23 Ibid. 430; *Evans v. State*, 44 Miss. 762.

⁴ *Lombard v. Martin*, 10 George, 147; *Burns v. Kelley*, 41 Miss. 339; *Hays v. Hynds*, 28 Ind. 531; *Southern Ex. Co. v. Newby*, 36 Geo. 635; *Caw v. People*, 3 Neb. 357; *Drury v. White*, 10 Mo. 354.

⁵ *Herndon v. Bryant*, 10 George, 335. Where the question raised on the evidence is the breach of a warranty, a charge in reference to the law arising out of a fraud is abstract. *Milton v. Rowland*, 11 Ala. 732.

consider, among other things, "the loss of time by her, the expense incurred for medical attendance, and the board while sick, and the like," and it was objected that the instruction was erroneous because inapplicable, there being no evidence on these points; the court however held that as it was in evidence that plaintiff had given birth to a child, there was thus some evidence on which to support the charge.¹

Where an instruction was given not properly applicable to the evidence, and it appears probable that the jury were misled by it, the judgment must be reversed.² So, in an action against a railroad for running over the plaintiff, an instruction to the jury that if they believed the injury was wilfully or recklessly done, they might give exemplary damages, was erroneous when there was no evidence of recklessness or gross negligence.³

§ 315. **Hypothetical Facts — Instructions on.** — Connected with the previous subject is that of referring in a charge to hypothetical facts. It is necessary to know when this is allowable and when it will be erroneous. Sometimes this mode of giving instruction is approved when the facts supposed are found in the case under consideration, as this enables a court to apply rules of law without assuming the facts to be proved, which is considered so reprehensible in a charge to the jury. Thus, in *First National Bank v. Hurford*,⁴ it was held improper to give an instruction to the jury upon a hypothetical state of facts of which there was no evidence in the case. So, a charge which leaves it to the jury to find a verdict upon a state of facts implied by the charge, but contrary to the truth of the case, is erroneous.⁵

In criminal cases it is often best to state the law on a hypothetical state of facts, to avoid assuming the truth of facts to

¹ *Gray v. Bean*, 27 Iowa, 221.

² *Ward v. Henry*, 19 Wis. 76; *McGregor v. Armill*, 2 Iowa, 30.

³ *Kennedy v. R. R. Co.* 36 Mo. 351. See, to the same purpose, *Dickerson v. Johnson*, 24 Ark. 251; *Atkinson v. Gatcher*, 23 Ark. 101; *Whitfield v. Westbrook*, 40 Miss. 311; *Jeffersonville R. R. Co. v. Swift*, 26 Ind. 459.

⁴ 29 Iowa, 579. See, to the same point, *Gurney v. Smithson*, 7 Bosw. (N. Y.) 396; *Hampton v. Dean*, 4 Tex. 455.

⁵ *Hewitt v. Begole*, 22 Mich. 31.

the prejudice of an accused.¹ But where upon the trial of an indictment, the instructions to the jury as to the offence charged are unexceptionable and cover every element of the crime, and correct rules are laid down for the proper application of the evidence, it is not strictly the right of the prisoner to ask instructions upon a hypothetical case based upon other facts.²

To understand the application of the rule we should endeavor to find the reason on which it rests. This is stated in a case in Ohio very clearly. It there said that it is because such a course is calculated to mislead the jury, and induce them to suppose that such a state of facts, in the opinion of the court, was possible under the evidence, and might be considered by them.³

Now it may be inquired, does the rule prohibit the court from taking some facts outside the case for the purpose of illustrating a legal principle or rule of law? It evidently does not. For this is not calculated to confuse the jury, or to suggest to them facts not properly belonging to the case.

Where this mode of illustration was adopted, and it was claimed to be error, the court say: "In the illustrations that were given to the jury, the court certainly intended them to be taken only as hypothetical instances explanatory of a legal principle, and not as reciting any facts as proven on the trial."⁴

While it is allowable to base instructions on a hypothesis as appearing from the evidence, care should be taken that it is founded on the evidence. As in a case of murder where the judge charged, "If the prisoner went to the house of Hodges, having a deadly weapon, for the purpose of taking the life of the deceased if he should find him there, or of provoking him into a fight, and did so, then it would be a case of murder, although they should believe the deceased made the first assault;" this was held error, there being no proof that the deceased made the first assault.⁵

¹ *Hopkinson v. People*, 18 Ill. 264; *Sherman v. Dutch*, 16 Ibid. 283.

² *Slatterly v. People*, 58 N. Y. 354.

³ *Breese v. State*, 12 Ohio N. S. 146.

⁴ *Sharpe v. State*, 48 Geo. 16. See *Masters v. Town of Warren*, 27 Conn. 300.

⁵ *State v. Harrison*, 5 Jones (N. C.), 115. See, further, *Smith v. Sasser*, Ibid. 388; *Hunnewell v. Hobart*, 42 Me. 565.

§ 316. Assuming facts as proved is a common and a mischievous error in instructions, and is strongly condemned. Whenever facts are controverted by the evidence it is error for the court to give any instructions which assume that such facts are proved.¹

The court in Ohio say, in reference to such instructions, "To give the instructions asked would have been to a great extent taking the case from the jury by assuming the existence of material facts in the case. The court could not say to the jury that the failure of the girls to look in the direction of the gravel train, when approaching, and standing upon the track, was carelessness such as should prevent a recovery, without assuming the existence of material facts in the case which it is for the jury to find. The instructions asked assume the agency of the elder sister, and assume the non-existence of any facts or circumstances rendering it prudent or proper for her to omit looking out. These were matters for the jury, and could not be found or assumed by the court, no matter how plainly they might have been proven."²

So an instruction in a trial for murder which assumes that the name of the party killed is correctly stated in the indictment is erroneous;³ and where the question was whether the delivery of personalty was by way of gift or a loan, it was error to charge "that if the plaintiff's evidence, that the property in dispute was a mere loan, is not successfully contradicted, the jury must find for him."⁴

Where the existence of a partnership is involved, it is error for the court to charge, assuming the partnership, that therefore the party is liable. Such an instruction embraces both law and fact, and is erroneous.⁵

It is therefore the duty of the court to refuse to give an instruction at the request of a party, when that instruction as-

¹ *Chicago, &c. R. R. Co. v. Griffin*, 68 Ill. 499; *Maltby v. R. R. Co.* 16 Md. 422; *Mayor, &c. v. Trimble*, 25 Ibid. 18; *Chichester v. Whiteleather*, 51 Ill. 259; *State v. Jones*, 33 Iowa, 9; *Girdner v. Taylor*, 6 Heisk. 244; *Montgomery v. Erwin*, 24 Ark. 540; *Stebbins v. Miller*, 12 Allen, 591; *Buttram v. Jackson*, 32 Geo. 409; *Ramsey v. Bullock*, 32 Ibid. 376; *Pratt v. Ogden*, 34 N. Y. 20; *Farnan v. Childs*, 66 Ill. 544.

² *Preston v. Keys*, 23 Cal. 193; *R. R. Co. v. Snyder*, 24 Ohio N. S. 678.

³ *State v. Dillihunt*, 18 Mo. 331.

⁴ *Dunlap v. Hearne*, 8 George, 478.

⁵ *Doggett v. Jordan*, 2 Fla. 541.

sumes the truth of a fact in controversy. Thus, in an action against the surety of a purser for the defalcation of his principal, when the defence set up was that the surety was not liable, an instruction was properly refused based on the fact of his not being liable.¹

So, on the trial of B. and S. for assault with intent to murder, the following instruction was held to be erroneous for assuming facts as proved: "If the jury believe from the evidence that B. and S. were together, and acted in concert at the time the assault to murder was made, they should find them equally guilty."²

The evil of giving such instructions at the request of a party is well stated in *Luman v. Karr*.³ It is there said: "Such instructions are calculated to mislead the jury; and although they state the law correctly, they charge too strongly upon the facts. . . . Nothing would be more likely to exert an undue influence on a jury than the positive and decisive language contained in the instructions in reference to the facts."

§ 317. It is not error when an instruction is based on a fact which is conceded by the pleadings, and is therefore uncontroverted. In a case where an instruction was excepted to in the appellate court because it was based on the fact of the insolvency of a vendor from whom the defendant derived title, it was held no error, because it appeared the insolvency was not denied in the lower court, and no conflict of evidence appearing on the point.⁴

And it is no objection to a charge that it shows a state of facts which the evidence showed really to exist, and deduced the legal conclusion applicable thereto.⁵ So, an instruction, that if the defendant did certain acts specified, the jury should infer a fraudulent intent, is not open to the objection that it assumes that these acts are established.⁶

¹ *Strong v. United States*, 6 Wall. 788.

² *Bond v. People*, 39 Ill. 26. See *Hatch v. Garza*, 22 Tex. 176; *Burr v. Williams*, 20 Ark. 171.

³ *Greene (Iowa)*, 159.

⁴ *Hughes v. Monty*, 24 Iowa, 499; *Lamar v. Williams*, 39 Miss. 342.

⁵ *Linn v. Wright*, 18 Tex. 317. See *Morse v. Gilman*, 18 Wis. 373.

⁶ *State v. Thompson*, 19 Iowa, 299.

So, where in a case it appeared established by the pleading and evidence that a certain consideration for notes was given, it was not error to charge assuming the fact of such consideration.¹

§ 318. The error is not cured by the correct statement of the law, if a fact be assumed which is in controversy. The evil still exists; no matter how correct the rule of law may be applied, the jury are nevertheless in danger of being influenced.² And this fact may be assumed in various indirect ways. Thus, where the court used the language, "When the defendant has shown, or shows, &c.," it is objectionable, because it assumes, in an indirect manner, a fact in the case. And in reference to this, the court say: "This language, when used in reference to conflicting testimony before a jury, is always improper. The court cannot predicate or assume that any fact embraced in the issue has been *shown* or proven."³ So, a charge that they may infer a prisoner's guilt from certain facts hypothetically stated, "and other circumstances," is erroneous, because it assumes the existence of other criminalizing circumstances, instead of leaving it to the jury to infer these from the evidence.⁴ But, in another case, a charge that fraud could be proved by circumstances, and that the jury must look to all the circumstances connected with the transaction to arrive at a correct conclusion, was held to mean that the jury were to look to the circumstances in proof, and therefore it was not erroneous.⁵

§ 319. Instructions that single out particular facts are as obnoxious as those that assume facts in controversy. It is the duty of the court to comment upon the *whole* case, and not to take any particular aspect of it on which to charge. In this way manifest injustice would be done to a party, for many facts, if isolated, are susceptible of a construction wholly different from that which they bear when brought into light with

¹ Cook v. Whitfield, 41 Miss. 541; Heartt v. Rhodes, 66 Ill. 351.

² Gray v. Burk, 19 Tex. 232; Barker v. Justice, 41 Miss. 240.

³ McKenzie v. Bank, 28 Ala. 606. See, to the same point, Koenig v. Katz, 37 Wis. 153.

⁴ Thompson v. State, 30 Ala. 28.

⁵ Walcot v. Brander, 10 Tex. 424.

others. So, it is error for a court to single out an isolated fact, and instruct that, as a matter of law, it amounts to negligence.¹

And the rule is general in criminal trials, that the omission in the charge of any circumstances that may be important to the defendant as establishing the presumption of his innocence is a ground for exception.² Also, where an instruction comments upon certain circumstances presumptive of guilt to the exclusion of others in evidence.³

And where a mercantile custom is proved by uncontradicted evidence, an instruction which entirely ignores such custom is erroneous.⁴ So, where a party asks instructions which are decisive of the suit, but which exclude from the consideration of the jury the points raised by his adversary, and they are given, it is error.⁵ A prisoner has no right to an instruction from the court, that if the jury do not believe the testimony of two named witnesses he is entitled to an acquittal, when the case stated shows that there were other witnesses who gave material testimony to prove his guilt.⁶

Where a request is an entire proposition made in reference to the plaintiff's right of recovery, and not in reference to damages, and is properly denied, it is not error for the court to omit to single out a particular part of it and apply it upon the question of damages, if in the charge given there is no affirmative error as to the assessment of damages.⁷

§ 320. The grouping of particular facts, and presenting instructions thereon, is another objectionable mode of charging a jury. The evil is based on the same ground as that pointed out in the last section.

In an Iowa case,⁸ after the jury had heard the evidence and

¹ *Meyer v. R. R. Co.* 40 Mo. 151. To the same purpose, *Chappell v. Allen*, 38 Mo. 213; *Ward v. Forrest*, 20 How. Pr. 465; *Bergen v. Riggs*, 34 Ill. 170.

² *Cox v. State*, 32 Geo. 515.

³ *Aaron v. State*, 39 Ala. 684.

⁴ *Williams v. Woods*, 16 Md. 220.

⁵ *Clark v. Hammerle*, 27 Mo. 55; *Relf v. Rapp*, 3 Watts & S. 21; *Doan v. Duncan*, 17 Ill. 272.

⁶ *State v. Baker*, 69 N. C. 147.

⁷ *Whittaker v. Perry*, 38 Vt. 107.

⁸ *State v. Carnahan*, 17 Iowa, 256; *Pritchett v. Overman*, 3 Greene, 531; *Porter v. Harrison*, 52 Mo. 524.

arguments of counsel, the court gave the instructions requested, and also gave on its own motion an instruction wherein many facts were grouped together, but legitimately provable in the case, and which the evidence tended to establish, and instructed the jury that "such facts as these, if shown by the testimony, constitute circumstantial evidence." It was held that while this mode of instructing a jury should not be encouraged, it was not necessarily erroneous, since the counsel might have requested additional instructions embodying other facts, which he omitted to do on the occasion; however, if he had so requested, and it were refused, it would doubtless be error, as remarked by the court.

So, instructions which amount to a commentary on the evidence, giving particular facts undue importance, are erroneous.¹ Where the court instructs a jury that the mortgagee in a chattel mortgage must take possession in a reasonable time, it should also inform them what facts in reference to the case on trial would constitute reasonable diligence.²

§ 321. Instruction on the sufficiency of evidence is an error into which a court is not seldom led. It thus invades the distinct province of the jury, who are to determine from the evidence whether any fact is *sufficiently* proved or not, except in those cases where the law has declared a rule as to what shall be sufficient evidence of a fact, as, for instance, in the case of perjury or treason.³ When there is any evidence tending to establish a fact, it is error for the court to instruct the jury that there is no evidence to establish it — the jury are to judge of the sufficiency.⁴ Thus, if the defendant in ejectment gives certain matters in evidence of title which are not attempted to be disproved, it is erroneous to instruct the jury that he has shown a legal title.⁵ And when the fact of agency was involved, and evidence given to show it, an in-

¹ *File v. St. Louis*, 39 Mo. 59; *McCartney v. McMullen*, 38 Ill. 237; *Larue v. Russell*, 26 Ind. 386; *Ellis v. Matthews*, 19 Tex. 390.

² *Barbour v. White*, 37 Ill. 164.

³ 1 Greenl. Ev. § 257.

⁴ *Sawyer v. Nicholls*, 40 Me. 212; *Morris v. Hall*, 41 Ala. 510; *Brook v. Grand Trunk R. R. Co.* 15 Mich. 332; *Lamar v. Clawson*, 38 Geo. 252.

⁵ *Bryan v. Wear*, 4 Mo. 106.

struction that the evidence was insufficient was held erroneous.¹

An instruction that the admissions and declarations of a party as to his intention of leaving the State at the time an attachment was sued out against him, are legal and sufficient evidence against him, but not in his favor, is erroneous.²

There are occasions, however, when a court may properly declare on the sufficiency of evidence without error.

The rule is laid down that it is not erroneous to instruct the jury on the sufficiency of evidence when the court would feel bound to set aside the verdict of the jury because against the evidence.³ So, it is held that an instruction that upon the evidence a party cannot recover, is only justified where there is a total failure of evidence to uphold a verdict. When there is any evidence tending to prove the issue, it must be submitted to the jury.⁴

§ 322. Commenting on the weight of evidence is an abuse to which a charge is often liable — an abuse which is condemned by authority as well as positively prohibited by statute in a great many places. It is an error very hard to guard against; there is a strong and a seductive temptation to a judge, in referring to the evidence, to express some preference or inclination towards certain of its aspects. This may be done, often unconsciously to himself, either by dwelling with greater emphasis on some features of the case, or giving prominence to certain of its facts.⁵ It is a tendency to which even the most cautious and impartial judges may sometimes be inclined. It is, indeed, not easy for a mind clearly and forcibly impressed with the incredibility of alleged facts, or with the manifest untruthfulness of a witness, to avoid expressing an opinion thereon, or in some manner manifesting that opinion.

¹ *Bank of Montgomery v. Plannett*, 1 Ala. Sel. Cas. 178.

² *Baker v. Kelly*, 41 Miss. 696.

³ *Governor v. Shelby*, 2 Blackf. 26; *Hurt v. Miller*, 3 A. K. Marsh. 337.

⁴ *Clafin v. Rosenberg*, 42 Mo. 439.

⁵ "I am at a loss to know by what rule the precise quantum of force, which should be attached by a judge to a particular piece of evidence on a trial is to be measured." *Hallock, B.*, in *Attv. Gen. v. Good*, 1 McCl. & You. 286. Chief Justice Parker remarked, on the right of a judge to pass an opinion on facts: "The next step will be to move for a new trial on account of the expression of the countenance of the judge." *Commonwealth v. Child*, 10 Pick. 252.

But experience has taught us that where such a power may be once rightfully used, it may be ten times abused to the prejudice of a party, and therefore in this country we jealously restrict the right of a judge to express or intimate his opinion as to the weight of the evidence, deeming it a usurpation of the appropriate province of the jury. In a great number of our States such power is specially denied to the judge by statute; and in others judicial decisions would hold it a ground for a new trial, independent of any statutory enactment.

There is not so strong a disapprobation of this practice in England. Indeed, some authorities there deem it a proper and judicious course for a judge. In reference to this a writer says: "Although this mode of proceeding, when adopted, as it sometimes has been in a supercilious spirit, may arouse the jealous feelings of a jury, and may excite them in their anxiety to prove their independence to pronounce an unjust verdict; yet it may well be doubted whether, in the great majority of instances, it would not promote the real interests of justice if the judge were temperately to state to the jury what opinions he had formed respecting the merit of the case, and the mode by which he had arrived at his conclusions. The jury would still have the undisputed power of deciding the question as they thought fit; but they would have the advantage of being advised by a man no more liable than themselves to prejudice or partiality, whose long experience in courts of justice must of necessity have rendered him far more competent than they can be to unravel the tangled threads of conflicting testimony."¹

§ 323. *When Error.* — It is in many cases deemed sufficient to reverse a judgment, especially when it may have unduly influenced the jury to the prejudice of a party. There are many cases which hold that an intimation by a judge to the jury of his opinion on matters of fact, is ground for a new trial.²

¹ Taylor Ev. § 23.

² Foust v. Yielding, 28 Ala. 658; Lawler v. Norris, 28 Ala. 675; State v. Baker, 8 Md. 44; Early v. Garland, 13 Gratt. 1; State v. Allen, 3 Jones (N. C.), 257; St. Louis R. R. Co. v. Manly, 58 Ill. 300; Salter v. Glenn, 43 Geo. 64; State v. Harkin, 7 Nev. 377.

Where a judge in charging a jury uses the language, "If her character is of ordinary respectability, you will take her testimony to be true, unless she is fully and thoroughly contradicted," it is erroneous; for it is the province of the jury to pass upon the credibility of a witness and the weight of testimony.¹

So when the court below instructed a jury that "an *alibi* is a species of defence often set up in criminal cases, and one which seems to figure in this case;" it was held that this language was well calculated to convey to the jury the impression that the court regarded that particular defence as a pretence, without foundation in truth, and therefore is erroneous.² So, in Massachusetts, where a witness at the trial of an indictment for keeping a tenement for the illegal sale of intoxicating liquors, having testified that he bought liquor from the defendant for the purpose of testifying against him, and the judge directed the attention of the jury to this point, intimating an opinion as to its weight; this was held to be contrary to the statute forbidding the judge to charge "with respect to matters of fact."³

Where the instruction was, in connection with other matters, "Go along and find the defendant guilty," it was held to be a great violation of judicial propriety, and the conviction and sentence was reversed.⁴

In a late English case, which was an action brought by assignees in bankruptcy to recover the value of goods alleged to have been fraudulently sold by the bankrupt, a misdirection was held sufficient to set aside a verdict. Cresswell, J., says: "I am of opinion that the summing up of the lord chief justice, taken literally, was quite correct. But at the same time we are all of opinion that there are one or two passages in it which may very well have been misunderstood, and that the jury may have supposed it was intended as a direction in point of law, and not a mere expression of his lordship's opinion in point of fact."⁵

¹ *State v. Parker*, 66 N. C. 624.

² *Walker v. State*, 37 Tex. 366; *Williams v. State*, 47 Ala. 659.

³ *Commonwealth v. Foran*, 110 Mass. 179.

⁴ *Sims v. State*, 43 Ala. 33.

⁵ *Pennell v. Dawson*, 18 C. B. 355. For a judge to say to the jury in a case in-

§ 324. It is not error unless prejudicial to a party, is the view that some cases hold in respect to comments by the court on the evidence. This is the case in those States where it is not specially forbidden by statute. This is in harmony with the English doctrine as enunciated above.

In *Van Vechten v. Griffiths*,¹ it is held that the remedy should be by a request for further instruction, which if refused will then be error. So it is held while the mere expression of an opinion as to the facts of a case, the weight of evidence, or the character of a witness, may not be error, where the question is still left for the determination of the jury, yet if the expression of opinion is made in such a manner that the jury may naturally regard it as a *direction* to them, and as excluding them from finding the fact for themselves, there being evidence proper for them to consider, both for and against such direction, this is fatal error.²

In *Shank v. State*,³ it is held the court is not bound to remark upon the evidence, and when it is done it should be with great care, and the jury should be told that such observations are submitted to aid and not to control them.

§ 325. The Law given by the Court. — The single unquestioned duty of the court is to declare to the jury the law bearing on the case at issue. This is the acknowledged, appropriate province of the court, and should not be delegated to the jury, no more than the functions of the latter in respect to matters of fact should be usurped by the court.⁴

In the previous sections we have pointed out rather what the judge ought *not* to charge upon; now we more properly refer to what his exclusive duty is.

It is the right of a party to have the jury instructed on the

volving questions for their determination, "I shall hold that the plaintiffs are justifiable in bringing this action," is error. *Johnson v. Johnson*, 71 N. C. 402.

¹ 4 Abb. App. Dec. 487. The New York opinions hold this doctrine. See *Althorf v. Wolfe*, 22 N. Y. 355; *Jackson v. Packard*, 6 Wend. 415; *Ditmars v. Commonwealth*, 47 Penn. St. 335.

² *Ketchum v. Ebert*, 33 Wis. 611.

³ 25 Ind. 207. See *Davidson v. Stanley*, 3 Scott, 49.

⁴ An instruction to the jury on a criminal trial, "that if they entertain doubts as to the law, the prisoner is just as much entitled to the benefit of those doubts as if they applied to the facts," is erroneous. *O'Neil v. State*, 48 Geo. 66.

whole law of the case, and not partially.¹ The remedy for this is by a request, which if refused is a ground of exception.

It is therefore erroneous for a question of law to be submitted to the jury for decision.²

A judge is bound to instruct the jury on the law itself, and not on its history, object, or purpose. So, he may refuse to charge that the only object of the register of a vessel is to entitle it to the benefits of an American bottom.³ An instruction that the defendants must prove every material averment in their plea of usury before the issue on such plea can be found for them, is error, as it refers to the jury to determine the materiality of the averments, which is a question of law.⁴

Where a new promise was made, *without dispute*, and relied upon as an answer, it is error to submit to the jury.⁵ So, when the facts are agreed upon, to submit whether the case is within the bar of the statute of limitations,⁶ or whether the language used is libellous on its face,⁷ or of the whole question of the construction of a deed as depending upon parol testimony of what the parties said or did in regard to the subject-matter thereof.⁸

When the evidence of a foreign law consists entirely of a judicial opinion, the question of its construction and effect is for the court, and it is improper to submit it to the jury.⁹

The court should instruct the jury as to what is due diligence in giving notice of dishonor.¹⁰

It is only necessary to instruct the jury by stating the law correctly with reference to the case upon trial and the facts sought to be established, without reference to exceptions not applicable to the case.¹¹

¹ *People v. Bagnell*, 31 Cal. 409.

² *Gehr v. Hagerman*, 26 Ill. 438; *Coleman v. Roberts*, 1 Mo. 97; *Hickey v. Ryan*, 15 Ibid. 62; *Russ v. Steamboat*, 9 Iowa, 375; *Farquhar v. Dallas*, 20 Tex. 200; *Butler v. Thomason*, 11 B. Mon. 235.

³ *Lincoln v. Wright*, 23 Penn. St. 76.

⁴ *Fugate v. Carter*, 6 Mo. 267.

⁵ *Clark v. Dutcher*, 9 Cow. 674.

⁶ *Rede v. Swift*, 45 Cal. 255.

⁷ *Van Vactor v. Walkup*, 46 Cal. 124; *Eastham v. Curd*, 15 B. Mon. 105.

⁸ *Mowry v. Stogner*, 3 S. C. 251; *Gardner v. Stell*, 3 Tex. 561; *Sellers v. Johnson*, 65 N. C. 104.

⁹ *Bowditch v. Soltyk*, 99 Mass. 136.

¹⁰ *Fugitt v. Nixon*, 44 Mo. 295.

¹¹ *State v. Downer*, 21 Wis. 275.

§ 326. On Presumptions of Law and Fact. — It is the duty of the court to charge the jury in reference to the presumptions of law applicable to the case before them, distinguishing those that are conclusive from those that are disputable. With regard to presumptions of fact, they are in general to be made by the jury. But there is a distinction between these presumptions. Thus, it is stated: "Natural presumptions are derived wholly by means of the common experience of mankind, from the course of nature and the ordinary habits of society. Such presumptions are, therefore, wholly independent of the system of laws to be applied to the facts when established; they remain the same in their nature and operation, whether the law of England or the Code of Justinian is to decide upon the legal effect and quality of the facts when found."¹ But some of these presumptions are recognized by the law, as the presumption in the case of the recent possession of stolen goods.

Two recent cases, one in Indiana and another in California, give a correct statement of the law in regard to the duty of the court with respect to these presumptions. In the case in Indiana the court say: "We suppose it proper for the court to state to the jury a legal presumption for their government, informing them, if it is an indisputable presumption, that they must be governed by it, or if it be a disputable presumption that it is to stand good until the contrary is established by the evidence or by a counter presumption. But we cannot think that it is either proper or safe for the court to so far invade the province of the jury as to direct them when they shall make or apply a mere presumption of fact."²

In the California case the instruction was: "The possession of stolen property is not alone sufficient to convict. It is merely a guilty circumstance which, taken in connection with other testimony, is to determine the question of guilt." The

¹ Stark. Ev. 751. Where a presumption is one of fact merely, the court is not warranted in declaring it to the jury as a presumption raised by the law. *Ham v. Barret*, 28 Mo. 388. When the question was as to the soundness of a negro at the time of sale, a charge that if the negro had a chronic disease of the chest a few weeks after the purchase, it was scarcely possible that he was sound at the time of the sale, is a presumption of fact, and therefore erroneous. *Jones v. Yarborough*, 2 Ala. 524.

² *Allison v. State*, 42 Ind. 354.

objection was in reference to the use of the words "guilty circumstance;" but it was held that the phrase meant, "circumstances tending to show guilt," and was not objectionable.¹

An instruction that one fact may be presumed from another, unless it is a presumption from law, will in general be a ground for a new trial.² So, in an action upon a note, one of the defences was, that it was included in an arbitration. The charge was that, although it was not thus included, the defendant might go to the jury upon a presumption of payment previous to the award, no facts being proved to sustain such presumption.³

So, for an instruction that the words "for value received," in a note, imported a consideration, and that gratitude to the father of the plaintiff (an infant), or affection to the child, would suffice.⁴

§ 327. **In Reference to Criminal Cases especially.** — More caution and precision are required in instructions in criminal cases; for the law shields an accused from every unfavorable influence on his case; and any error by which the jury would be likely to be misled in an instruction will be available to grant a new trial. Accordingly, the errors assigned in instructions are more generally in connection with criminal prosecutions. The points on which error is frequently made are in reference to the grade or character of the offence, the nature or amount of evidence required, omitting exculpatory facts and circumstances, or suggesting false inferences from facts or circumstances.

§ 328. **As to the grade or character of the offence,** it is the duty of the court to define in all its elements the offence charged, to point out what constitute the different grades of offence charged in an indictment, as in the case of homicide. In *Maria v. State*,⁵ the court charged the jury: "In murder

¹ *People v. Rodundo*, 44 Cal. 538. See, to the same point, *Jones v. People*, 6 Park. Cr. 126.

² *Glover v. Duhle*, 19 Mo. 360; *Rogers v. McCune*, Ibid. 557.

³ *Harris v. Wilson*, 1 Wend. 511. See *Hollister v. Johnson*, 4 Ibid. 639.

⁴ *Holliday v. Atkinson*, 5 B. & C. 501.

⁵ 28 Tex. 698. But where the circumstances show, beyond all doubt, that a

in the second degree, the design to kill is conceived and executed in a transport of passion, which renders the mind incapable of cool reflection, and deprives it of the power to weigh well the nature and consequences of the act." This was held to be erroneous, because calculated to mislead the jury by not properly defining the distinction between murder in the second degree and manslaughter.

So, upon the trial of a person for an offence consisting of several grades, the court may instruct the jury, that if the crime as made out by the evidence is of a certain grade, and that if they believe the evidence, they must find their verdict accordingly.¹

Of course this would not apply in those places where the jury have power by statute to bring in a verdict of a different grade than that charged. But if the judge charges that the crime is murder or nothing, and conviction follows, the case will be reversed on error, if there is any view of the testimony which, if true, would reduce the offence to manslaughter.²

Where a court on an indictment for murder instructs that the defendant may be convicted of manslaughter, the instruction should define the latter crime.³

The court, however, must be careful, where the evidence is doubtful as to the grade of the offence, not to intimate an opinion that might be taken for a direction.⁴

So, where a jury, unable to agree, returned into court for further instructions, and were charged that, if they believed the witnesses, the case was clearly within one of the degrees of manslaughter, and it was for the jury to say which degree, this further charge was held erroneous, as withdrawing from them questions of fact.⁵

homicide was committed by lying in wait, the court need not instruct the jury as to the different degrees of the crime of murder. *State v. Byrne*, 24 Mo. 151.

¹ *State v. Starr*, 38 Mo. 270; *State v. Joeckel*, 44 *Ibid.* 234; *McNevin v. People*, 61 Barb. 307. On a trial for murder a request to charge as to all the grades of homicide is properly refused when not required by the theory of the defence. *Hill v. State*, 41 Geo. 484.

² *State v. Kirkland*, 14 Rich. (S. C.) 230.

³ *State v. Sloan*, 47 Mo. 604; *Payne v. Commonwealth*, 1 Met. (Ky.) 370.

⁴ *People v. Quin*, 1 Park. Cr. 340; *Choice v. State* 31 Geo. 424.

⁵ *People v. Pfomer*, 4 Park. Cr. 558.

If a jury return with the general verdict of guilty, they may be directed to return and find in what degree.¹

§ 329. **Charging Distinct and Separate Offences.** — While the court should point out the different grades of the same offence, it must be careful not to charge on a separate and distinct offence. Thus, on an indictment for assault and battery with intent to commit rape, the evidence being insufficient to convict of anything more than a simple assault, the court submitted the question of attempt to commit rape to the jury, and they found the prisoner guilty of assault. It was held that the submission of the question in this manner was erroneous.²

So, if the indictment charges burglary mixed with larceny, it is error on the trial for the judge to charge that they may find the defendant guilty of grand larceny, when the case is conducted on the theory that the defendant is on trial for burglary; for larceny, if committed at the same time, is not included in the burglary, as manslaughter in murder.³

§ 330. **Nature and Amount of Evidence.** — Mistakes are often made in instructions as to the facts necessary to prove a certain crime, and the degree of force with which the evidence should impress itself on the mind of the jury.⁴

At common law, every homicide by violence implied malice, but under our statutes this is not necessarily implied. Therefore, as in New York, there must be an intent to kill proved and found before conviction for murder. Hence, a charge to the jury which defines certain acts to be murder, as striking a blow, the natural consequence of which was to precipitate another into the water by which he was drowned, unless explained away by the evidence attending the transaction, is erroneous.⁵

¹ *People v. Bonney*, 19 Cal. 427.

² *Reynolds v. People*, 41 How. Pr. 179.

³ *People v. Garnett*, 29 Cal. 622.

⁴ The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; a mere preponderance of evidence is not sufficient for the purpose. *Stark. Ev.* 817.

⁵ *Wilson v. People*, 4 Park. Cr. 619.

The law has made a clear distinction between the degree or force of the conviction arising from the evidence in a criminal case and that in a civil case. In reference to criminal prosecutions, it is necessary that the evidence be so clear and convincing as to point irresistibly to guilt, and to be irreconcilable with the supposition of innocence; while a mere *preponderance* of the evidence is only required in a civil case. It is said the reason that the law required this *amount of evidence* in a criminal case was on account of the fearful consequences following a conviction of crime at a time when the penal code was severe and sanguinary in its character. But though our penal laws are now less sanguinary, and the consequences of some crimes less dreadful, the rule is not relaxed; it is still required that the evidence be as strong and as convincing on the minds of the jurors as ever; and it is now no less the duty of the court to instruct as to the nature and degree of the evidence necessary for the conviction of an accused.

§ 331. *As to Express or Implied Malice.*—Every criminal act will necessarily consist of two ingredients,—the intent and the outward visible act; or it may be considered as involving two facts,—the psychological fact and the physical fact; and to constitute legal guilt there must be proved these two facts. The maxim of the law is *Actus non reum, sed mens*; and acting on the principle of this maxim, the law regards the intent as the main ingredient of a criminal act. The name given to this intent in cases of homicide is *malice*, and this must be found to exist before an act of killing another can be declared murder. But of late courts have differed as to the *manner of finding this malice*, whether it can be implied or must be expressly proved. Instructions on this point are not uniform, because in some places the common law doctrine of implied malice is upheld, while in others it is disapproved, and malice must be expressly proved, and not inferred from the mere act of killing under certain circumstances. The rule is laid down in one of our oldest cases that “if one Man kill another, and no suddain Quarrel appeareth, this is Murder, as Co. 9 Rep. fol. 67, b., MaKelly’s Case. And it lyeth upon the party indicted to prove the suddain Quarrel.”¹ This is

¹ Legg’s case, Kelying, 27.

the common law doctrine, and has been followed to a great extent here in some of our leading criminal trials. It was the doctrine at one time of the New York courts, as it was held in *People v. McLeod*,¹ that "all homicide is presumed to be malicious, and therefore murder until the contrary appear from evidence." In the leading case of *Commonwealth v. York*² the doctrine was also adopted, and the court charged the jury that "the rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious and an act of murder." It was also followed in the celebrated case of *Commonwealth v. Webster*.³ It is the doctrine of the Mississippi courts where the following instruction was held correct: "If the act producing death be such as is ordinarily attended with dangerous consequences, as by the use of a deadly weapon, or be committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation should be shown; for the law infers that the natural and palpable effects of any act deliberately done were intended by the agent."⁴ The presumption that all homicide is murder has been recognized also in Georgia.⁵ In a late capital case in England, it was held that "the prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved the law presumes malice."⁶

But of late the tendency is to hold the prosecution to a strict proof of malice, and the common law doctrine of implied malice is disapproved. This was held in *Stokes v. People*,⁷ where it was error to charge according to the common law view of implied malice. But the court held it was error because of the statutory definition of murder in New York, where murder is "a premeditated design to effect the death of the person killed or of any human being." And as this is the definition of murder in our statutes generally, it is therefore

¹ 1 Hill, 377.

² 9 Met. 93.

³ 5 Cush. 386.

⁴ *Mask v. State*, 36 Miss. 77; *Hague v. State*, 34 Ibid. 616.

⁵ *Choice v. State*, 31 Geo. 424; *Clark v. State*, 35 Ibid. 75.

⁶ *Reg. v. Maloney*, 9 Cox Cr. C. 6.

⁷ 53 N. Y. 164.

probable that the doctrine of implied malice will no longer be upheld.¹

§ 332. **As to Reasonable Doubt.** — Error is frequently committed in a charge in reference to the use of the terms, “reasonable doubt” or “moral certainty.” It is the duty of the court to declare the amount of evidence required in criminal cases; and it will often be necessary to give some definitions of these terms to a jury.² Attempts to do so sometimes result in confusing instead of enlightening the jury, and for this reason some courts have discouraged the practice. Thus, where a court was requested to charge, using the term “moral certainty,” in reference to the degree of conviction of the evidence, it refused; and, on review, it was held proper to do so, because the use of the term was likely to confuse. The court thought it better to use the more familiar term, “reasonable doubt;” but condemned the practice of giving a definition, saying, “We think all such efforts, to say the best for them, are unsafe, indiscreet, and oftener than otherwise distract and confuse juries, and may lead them to convict when they ought to acquit, or to acquit when they ought to convict.”³ Notwithstanding, courts often give a definition of the term.⁴

¹ The premeditation must be proved in California. *People v. Valencia*, 43 Cal. 552; *People v. Donahue*, 45 *Ibid.* 321. In *Fouts v. State*, 4 *Greene* (Iowa), 500, it was charged that “at the time the blow was struck with the knife, it is willful, deliberate, premeditated killing, and therefore murder in the first degree,” and it was held error because the design should be formed before the blow was struck in order to constitute murder.

² What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding of the jury. On the other hand, absolute, metaphysical, and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt; even direct and positive testimony does not afford grounds of belief of a higher and superior nature. *Stark. Ev.* 865.

³ *McAlpine v. State*, 47 Ala. 78. See *Tuberville v. State*, 40 Ala. 715.

⁴ In *People v. Lachanais*, 32 Cal. 433, it was held a prisoner is entitled to a definition as to what the law means by a reasonable doubt. In *People v. Ash*, 44 Cal. 288, there is a very clear definition of the term. It is said: “Reasonable doubt of the guilt of a person is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.” In the charge in the *Webster* trial there is a very lucid definition. See *Commonwealth v. Webster*, 5 *Cush.* 310. In *Bowler v. State*, 41 *Miss.* 571, it is said, “That which amounts to mere possibility only, or to

§ 333. *Use of the Term.*—The term is properly used to characterize the nature of the conviction resting on the minds of the jurors in criminal cases when the life or liberty of a person is involved; but is improperly used where these interests are not at stake. As where, on a trial for manslaughter in the third degree, the killing was admitted, but it happened in an affray in which the deceased unjustifiably made the first attack, and it was claimed by the prisoner that the act was done in self-defence. The court charged that the prisoner was bound to prove his defence of justifiable homicide “beyond a reasonable doubt.” This was held error, and a new trial was granted.¹ The principle is that the *criminal act* must be proved beyond a reasonable doubt; but this is not the case in regard to a *defence*.

In cases of circumstantial evidence it is peculiarly necessary that instructions should be given as to the degree of proof, and then the term “reasonable doubt” is properly applied. So, in a case of this kind, where there was conflicting evidence on a material point, a charge that “if the jury entertain a reasonable doubt as to the existence of such fact, the defendant must be acquitted,” is pertinent and proper, and should be given.²

The following instruction was condemned: “If they have a reasonable doubt of the truth of any fact, any series of facts or propositions necessary and essential in their judgments to the conclusion of guilt, that the prisoner is entitled to the benefit of that doubt, and they must acquit him;” because it failed to inform them what were the essential facts necessary to be made out before they could find the prisoner guilty of any offence.³

It is held no reversible error for the court to refuse to charge concerning reasonable doubt, when there was no room for such doubt on the evidence.⁴

conjecture or supposition, is not what is meant by a reasonable doubt. The doubt which should properly induce a jury to withhold a verdict should be such a doubt as would reasonably arise from the evidence before them.” See *Wise v. State*, 2 Kan. 419; *State v. Ford*, 21 Wis. 610; *State v. Shettleworth*, 18 Minn. 209; *State v. Flugate*, 27 Mo. 535.

¹ *People v. Schryner*, 42 N. Y. 1; *State v. McCluer*, 5 Nev. 132.

² *People v. Phipps*, 39 Cal. 326.

³ *Sparks v. Commonwealth*, 3 Bush, 117.

⁴ *McGuire v. State*, 37 Miss. 369.

Where the facts relied on to convict were not a series of dependent circumstances, it was held no error to instruct the jury that though the prosecution had failed to establish any one or more of the facts relied on for conviction, yet if enough had been shown to satisfy them beyond a rational doubt, it would be their duty to convict.¹

§ 334. **Erroneous Application of.** — The misapplication of this term is frequently a ground of a reversal of judgment; for while the court may at first give a proper instruction as to its application and meaning, it often occurs that something is added thereby confusing or misleading the jury. In *People v. Brannon*² the instruction was that the jury should “be satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the important affairs of life.” The court say of this: “There must be more than a preponderance of evidence. There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused. For error of this instruction the case must be remanded for a new trial. And in a late decision, where the instruction was, “A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot feel an abiding conviction, to a moral certainty, of the truth of the charge. The doubt must not be vague and shadowy. Absolute certainty is rarely attainable, and is never required. *If the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there cannot remain a reasonable doubt within the meaning of the law.*” The court found the part of the instruction in italics erroneous. The court (Wallace, C. J.) say: “It is certainly a mistake to say that there cannot remain a reasonable doubt when even the evidence is such ‘that a man of prudence would act upon it in his own affairs of the greatest importance.’”³

¹ *State v. Frank*, 5 Jones (N. C.), 384.

² 47 Cal. 96.

³ *People v. Ah Sing*, Supreme Court, July, 1876. See *Jane v. Commonwealth*, 2 Met. (Ky.) 30.

§ 335. *Application of the Term in Civil Cases.* — Courts are not agreed as to the application of the term in civil cases when crime is imputed. Two of our authorities on evidence, Taylor and Greenleaf, hold that when crime is imputed in a civil case, the party charged would be entitled to the benefit of any reasonable doubt of his guilt, in the same manner as in a criminal trial.¹ Greenleaf states it with less confidence. He says the rule "is conceived" to be as stated. The two leading English authorities cited in support of the rule are Thurtell v. Beaumont,² and Chalmers v. Shackell.³

In the first case, the defence to an action on a policy of insurance was that the plaintiff had wilfully set fire to the premises destroyed. The judge told the jury, "that in order to substantiate the defence . . . the same evidence should be adduced as if the plaintiff had been indicted for arson; that it was their duty to be satisfied that the crime imputed to him was as fully substantiated in this action as would warrant their finding him guilty of the capital offence in case he had been brought before them and tried on an indictment on a criminal charge." This instruction was held not to be erroneous. The other case does not go quite as far; an examination will show it was rather to the *kind* than to the *amount* of evidence the judge called the attention of the jury. In the case of Magee v. Mark⁴ the rule was not approved, that in such cases the proof must exclude every reasonable doubt. The authority of the English cases, and the rule as laid down by Taylor, is followed in many places here. It is followed in Iowa,⁵ in Indiana,⁶ in Missouri,⁷ and in Illinois.⁸ In a late case in Maine the rule was condemned, and the court say: "But we think it time to limit the application of the rule which was originally adopted *in favorem vitæ*, in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or incumber the

¹ Taylor, § 97 A ; 2 Greenl. § 426.

² 1 Bing. 339.

³ 6 C. & P. 475.

⁴ 11 Irish C. L. 449.

⁵ Fountain v. West, 23 Iowa, 9; Ellis v. Lindley, 38 Ibid. 461

⁶ Tucker v. Call, 45 Ind. 31.

⁷ Polston v. See, 54 Mo. 291.

⁸ McConnells v. Delaware Ins. Co. 18 Ill. 228.

action of juries in civil suits sounding only in damages.¹ It is also disapproved in New Hampshire,² in Massachusetts,³ in North Carolina,⁴ in Wisconsin,⁵ and in Louisiana.⁶

In *Scott v. Home Ins. Co.*⁷ Dillon, J., charged: "The court instructs you that it is not necessary that the degree of proof should be the same as if the plaintiffs were on trial under an indictment for wilfully burning the property to defraud the insurance company. . . . The evidence need not to be such as to exclude all doubt, but it should be such as to satisfy your minds and judgment that they did, or caused, or procured the act in question to be done. On this point the decided cases are conflicting, but the foregoing seems to the court to express the sound and true rule on the subject." The court, in this case, laid down the rule that will probably hereafter be generally approved.

§ 336. **Suggesting certain inferences** is an error frequently made in charges in criminal cases, and when it appears that the defendant was prejudiced thereby a judgment will be reversed. As to suggest an unfavorable inference from the fact of a person not testifying in his own behalf,⁸ or insinuate bad faith in setting up a defence by way of *alibi*.⁹ It is error to allow the omission of an accused to call his wife to testify on his behalf, to be urged upon the jury as an unfavorable circumstance against the prisoner;¹⁰ and to instruct the jury that the fact that the prisoner had failed to introduce evidence as to his previous good character, was an element in the case which the jury had a right to take into consideration in de-

¹ *Ellis v. Buzzell*, 60 Me. 209. See, also, *Sinclair v. Jackson*, 47 *Ibid.* 102; *Knowles v. Scribner*, 57 *Ibid.* 497.

² *Folsom v. Brawn*, 5 *Fost.* 114.

³ *Gordon v. Parmelee*, 15 *Gray*, 413.

⁴ *Kincade v. Bradshaw*, 3 *Hawk*, 63.

⁵ *Washington Ins. Co. v. Wilson*, 7 *Wis.* 169.

⁶ *Wightman v. Western M. & F. Ins. Co.* 8 *Rob.* 442.

⁷ 1 *Dil. C. C.* 105.

⁸ *Ruloff v. People*, 45 *N. Y.* 213; *Doan v. State*, 26 *Ind.* 495. But it is not error to instruct a jury that they should take into consideration the omission of the prisoner to rebut the testimony of an accomplice, as bearing on the question of his guilt or innocence. *People v. Dyle*, 21 *N. Y.* 578.

⁹ *Walker v. State*, 37 *Tex.* 367.

¹⁰ *Knowles v. People*, 15 *Mich.* 408.

termining his guilt or innocence.¹ But it is not error where the court suggests to the jury a fact which does not appear in the evidence; and in immediate connection therewith tells them that the absence of such a fact is a strong circumstance in favor of the prisoner, and tends to throw doubt on the whole case.²

In regard to confessions, the court must be careful lest an unfair construction be put on, or an unfavorable inference deduced from them.³

Thus a charge: "You may give to the defendants' admissions and confessions such weight as you may deem them entitled to," was condemned, because it assumed a confession, not appearing in the evidence.⁴

In relation to instructions on circumstantial evidence, care should be taken not to charge the jury in regard to the relative importance of a fact or series of facts, or what inference may be drawn from any circumstance when proved. So error may be made in regard to the degree of conviction required in cases of circumstantial evidence.⁵

In the following instance the instruction on this head was sustained: "In order to convict, circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence."⁶

¹ *Donoghoe v. People*, 6 Park. Cr. 120.

² *Williams v. Commonwealth*, 29 Penn. St. 108.

³ Where evidence was given to the court in the presence of the jury, of confessions illegally obtained, and afterwards the judge rehearsed the evidence thus given for the purpose of cautioning them against permitting it to have any effect on their minds, except to weaken the force of voluntary confessions subsequently made, it was held to be no error. *State v. Gregory*, 5 Jones L. 315.

⁴ *People v. Strong*, 30 Cal. 157.

⁵ *Breen v. People*, 4 Park. Cr. 380. Upon the trial of a criminal case, the judge instructed the jury that the evidence was entirely circumstantial; that if they could not reconcile the facts proved upon any other theory than upon the guilt of the prisoner, they must find him guilty, but if they could reconcile them with his innocence, they must acquit him. This was held no error. *Commonwealth v. Annis*, 15 Gray, 197.

⁶ *People v. Cronin*, 34 Cal. 191. Although circumstantial evidence tending to show the prisoner's guilt is not admissible merely on the question of character, it is not error, when such testimony has been given on the issue, to instruct the jury that they may consider it, together with the testimony speaking directly to his character, for the purpose of judging of his character. *Carrington v. People*, 6 Park. Cr. 336.

§ 337. **Requests to charge.** — It is the right of a party to have the judge charge on points of law bearing on the case, and if proper and applicable, a refusal to charge as requested will be error. The charge, however, need not be in the exact terms of the request, if it embodies the principle of law correctly, except where otherwise provided by statute.¹

But the court has power to refuse where a charge is not pertinent to the issue, though it embodies a correct principle of law, and when the request assumes the existence of facts controverted.²

It is not obligatory on the court to give an extended series of instructions, though some of them are correct as propositions of law, if in the general charge the law has been given with sufficient fulness.³

In general, the court should give any instruction that counsel request, when it embodies a correct statement of the law bearing on the case, when it affords a presumption in a party's favor, when it is necessary to a clearer understanding of his rights or liability, and when it has not already been substantially given.⁴

§ 338. **Obscurity in language** may be a ground of refusal to give an instruction requested. There is no duty more clear to the court than to avoid presenting anything to the jury calculated to confuse or mislead them; hence, whenever instructions are requested, they should be couched in clear, unequivocal terms, or the court may properly refuse to give them.⁵

¹ *Rusch v. City*, 6 Iowa, 443; *State v. Collins*, 20 Ibid. 85; *Bland v. People*, 3 Scam. 364; *State v. Message*, 65 N. C. 480; *Higgins v. Carleton*, 28 Md. 115; *Dodge v. Rogers*, 9 Minn. 223.

² *Knight v. Clements*, 45 Ala. 89; *Parker v. Fergus*, 52 Ill. 419; *Grover v. Dill*, 3 Iowa, 337; *Reid v. Mason*, 12 Ibid. 541; *Wells v. Prince*, 15 Gray, 562; *Cane v. People*, 3 Neb. 357.

³ *R. R. Co. v. Whitton*, 13 Wall. 270; *Fuller v. Coates*, 18 Ohio N. S. 343. In Mississippi, in capital cases, the court is not authorized to instruct the jury except on request. *Edwards v. State*, 47 Miss. 581.

⁴ *Ormsby v. People*, 53 N. Y. 472; *Foster v. People*, 50 N. Y. 598; *Barber v. Marble*, 2 Thomp. & C. (N. Y.) 114; *Emerson v. Santa Clara*, 40 Cal. 543; *Goldsborough v. Cradie*, 28 Md. 477; *Underwood v. White*, 45 Ill. 437; *Norwood v. Boon*, 21 Tex. 592.

⁵ *Harman v. Shotwell*, 49 Mo. 423; *Nicholls v. Mercer*, 44 Ill. 250; *Golding v. Merchant*, 43 Ala. 705.

So an instruction, correct in the abstract, but liable to mislead by being enunciated wholly in technical language, is erroneous.¹

A party cannot be allowed to complain that the court would not stultify itself by giving at his instance instructions which contradict each other, and thus confuse rather than enlighten the jury.²

But it is not a good reason for the refusal to give instructions, that they were unnecessarily lengthy and numerous.³

When instructions requested are too general, the court may properly refuse to give them, as a prayer for an instruction that "upon the pleadings and all the evidence in the case, the plaintiff is not entitled to recover in this action."⁴

The general rule is, that requests for instructions should be so framed as to instruct and not embarrass or mislead juries, and whenever they may have the latter effect, it is not the duty of the court to reconstruct them, but to reject them entirely.⁵

§ 339. Modifying Instructions prayed for.—The courts exercise a discretion, when a request is not generally ambiguous and erroneous, to reconstruct it, and give the instruction in a modified form; and this is held proper when the substance and principle of law are thus correctly stated; though in some places statutes require either an absolute rejection or a submission of the instruction in the language requested.⁶

¹ *Watkins v. Wallace*, 19 Mich. 57.

² *Baltimore, &c. R. R. Co. v. Lafferty*, 2 W. Va. 140.

³ *McCaleb v. Smith*, 22 Iowa, 242. See, where the practice is condemned of asking for long instructions, *Adams v. Smith*, 58 Ill. 419.

⁴ *Yingling v. Kohlhaas*, 18 Md. 148; *Karber v. Nellis*, 22 Wis. 215.

⁵ *Cumberland, &c. Co. v. Scally*, 27 Md. 589; *Baltimore, &c. R. R. Co. v. Realey*, 14 Md. 424. When instructions are numerous and verbose, the court may reject them if they tend to confuse rather than enlighten the jury, and substitute a few clear precise instructions covering the case. *State v. Ott*, 49 Mo. 326. Requests to charge which embrace too much may be refused as a whole. *Hodges v. Cooper*, 43 N. Y. 216.

⁶ Thus, in North Carolina the privilege of modification, it seems, is confined to the phraseology. *State v. Brantley*, 63 N. C. 518. The statute of Alabama requires a correct charge not tending to mislead to be given as asked. Code, § 2355. However, where it seems to be too partial it may be explained in an additional charge of the court. *Bell v. Gray*, 35 Ala. 209; *Sharp v. Burns*, 35 Ibid. 654. But the general rule is to allow the court a discretion as to modifying instructions requested. *Grimes v. Martin*, 10 Iowa, 347; *People v. Dodge*, 30 Cal. 450; *Rosenbaum v.*

Where an instruction asked for is so equivocal that to give or refuse it might mislead the jury, it is the duty of the court to modify it;¹ and it may be modified, although the modification may be suggested by the opposite counsel.²

In Iowa, it is held that the better practice is for the court to put aside the instructions asked by counsel, and to cover the whole ground in a methodical and corrected charge of its own, stating the questions of fact to be decided, and the law applicable thereto under the issues and the evidence.³

A party has a right to complain, if the modification of an instruction requested does not embody substantially the principle of law he desires; the court may reject or modify; but the instruction must do full justice, and must declare the law upon the points raised by counsel accurately and intelligibly to the jury.⁴ And a party who asks an erroneous instruction, may well complain if it is given with such modification by the court as to prejudice his cause, such modification itself not being the law.⁵

In Texas, when an instruction was requested as to the plaintiff's right to recover for professional services, in these words: "that plaintiff was not entitled to recover unless he has proved to the satisfaction of the jury that he was a regular physician;" the judge struck out the word "regular" and substituted the words "skilful" and "efficient," and it was held no error.⁶

§ 340. Requests are sometimes denied, being a repetition of instructions already given, when the court is not bound to give them. It is singular that so many errors are assigned

Weeden, 18 Gratt. 785; *Law v. Cross*, 1 Black. 533; *George v. State*, 39 Miss. 570; *Boyce v. California Stage Co.* 25 Cal. 460; *Dodge v. Rogers*, 9 Minn. 223.

¹ *Ward v. Churn*, 18 Gratt. 801.

² *Blackburn v. Beall*, 21 Md. 208.

³ *State v. Collins*, 20 Iowa, 85.

⁴ *Snively v. Fahnestock*, 18 Md. 391.

⁵ *Morgan v. Peet*, 32 Ill. 281.

⁶ *Hays v. Hogan*, 4 Tex. 26. A modification may be made by means of another instruction at the instance of the opposite party. *Van Buskirk v. Day*, 32 Ill. 260; *Warner v. Dunnavan*, 23 Ibid. 380. And it is the duty of a party to ask when a modified instruction is necessary, otherwise he cannot afterwards complain. *State v. Phinney*, 42 Me. 391. Where a court was asked to charge that "verbal confessions of guilt are to be received with great caution," and the court, after the word guilt, inserted the words, "uncorroborated by circumstances," it was held no essential variance from the principle. *State v. Wilson*, 8 Clarke, 412.

because of the exercise of a right which has so repeatedly been acknowledged and supported. There is no rule more often declared than that a court is not required, at the request of a party, to give an instruction which has, in principle, been previously given.¹

Yet like all rules of a general character, this rule must not be too strictly applied; for there are many occasions when it will be not only proper, but eminently just to repeat an instruction. There are too often found in courts a self-sufficiency and a dogmatism that disincline them to accept suggestions or explanations which ought rightfully to be given, though they may in some manner repeat a principle already given. Often a statement may be given in such a general, technical, and even partial manner, that it becomes necessary for a party to have it repeated, either with some restriction or explanation, and then it should not be refused. Injury is more likely to arise from a too close adherence to this rule than from a liberal observance.

In a California case it is held that it may often be better to give repetitions when asked than to refuse them;² and in another case it is held that it is preferable when an instruction is refused to state before the jury the ground of refusal, that it was previously given, so a party may not be prejudiced by an open refusal.³ Repetitions are proper when they are necessary to particularize a general charge in which the law is correctly stated, and to show its application to the facts, or a particular point in the evidence.⁴

§ 341. Instructions in Relation to Damages. — It is the duty of the judge to instruct the jury as to the proper measure of damages, the elements that should be considered in estimating compensation, and the rules by which they should be

¹ *State v. Knight*, 43 Me. 12; *Cornly v. Tompkins*, 17 Geo. 351; *Payne v. Billingham*, 10 Iowa, 360; *Trustees v. Hill*, 12 Ibid. 462; *Gregory v. Cheatham*, 36 Mo. 155; *Davis v. Perley*, 30 Cal. 630; *Murphy v. People*, 37 Ill. 447; *Fay v. O'Neill*, 36 N. Y. 11; *Laber v. Cooper*, 7 Wall. 565; *People v. Murray*, 41 Cal. 66. In this last case the court say, in a criminal case it is the better way to give the instruction.

² *People v. Strong*, 30 Cal. 151.

³ *People v. Hurley*, 8 Ibid. 392.

⁴ *Rogers v. Brightman*, 10 Wis. 64.

guided. In the case of compensatory damages, the law has fixed rules as to their measure; it is otherwise in reference to vindicatory damages, which generally lie in the discretion of the jury. In cases where an excessive amount, manifestly exorbitant, is allowed, courts have exercised the right of setting aside the verdicts.¹

Error in a charge is frequently observed in instructions as to exemplary damages, when they are improperly allowed, or not demanded by the nature of the case, or when an improper standard is laid down in the case of compensatory damages.

§ 342. In reference to compensatory damages, the error is occasioned by a suggestion of a false standard of estimation.² As where a complaint asked to recover possession of certain real estate with damages for withholding, and certain evidence of the value of the use and occupation was allowed to be received, the instructions were held to be erroneous, that in estimating the damages such evidence should be considered.³ This was because the rents and profits would form a separate and distinct cause of action.

Thus, the proper measure of damages in an action against the sheriff for the wrongful seizure of a steamboat under execution is the actual value of the boat as property, and also interest, which is entirely in the discretion of the jury; and it was held error for the court to instruct them to allow interest.⁴

On the trial of an action on a promissory note, in which all the evidence bore on the issue whether the note was a forgery, the judge refused as inapplicable a request of the defendant for instruction to the jury on the measure of damages, in event that they should be satisfied that the note was genuine, but given for too large a sum by fraud or mistake; and this refusal was held proper.⁵

¹ *Chicago, &c. R. R. Co. v. Fillmore*, 57 Ill. 265; *Chicago, &c. R. R. Co. v. Jackson*, 55 Ill. 492; *Burkett v. Lanata*, 15 La. An. 337.

² Compensation, in its legal signification, consists in remuneration for loss of time, necessary expenditures, and for permanent disability if such be the result. *Parker v. Jenkins*, 3 Bush (Ky.), 587.

³ *Larned v. Hudson*, 57 N. Y. 151.

⁴ *Crow v. State*, 23 Ark. 685.

⁵ *Wetherbee v. Norris*, 103 Mass. 565.

Where a jury were instructed in regard to certain pass-books in evidence, that they "add up the pass-books to ascertain the amount," it was held misleading, since the jury might have understood it as directing them that the books were of that character of evidence which would exclude all questions except the amount thus obtained.¹

In an action by the mate of a vessel against the owners, to recover wages for services in navigating to the end of a voyage after the master's death, the jury may properly be instructed that he is entitled to recover what his services were worth to the owners, if his claim is only for the same wages that had been allowed to the master.²

It is the duty of the court to instruct the jury as to the rules by which damages are to be measured when they are determined by fixed principles of law; but in many cases the cause of injury may be so remote, and the evidence so conflicting, that the court may properly decline to instruct as to the liability, but may leave the whole matter to the jury, under general instructions as to the nature of the damages demanded by the case.³

But it is proper to refuse an instruction charging that the plaintiffs are not entitled to damages on a ground on which they have not claimed damages.⁴

§ 343. In reference to **exemplary damages**, the amount, unless grossly disproportionate, lies in the discretion of the jury; but the court is required to instruct when such damages are permitted. The doctrine is well settled that in cases where the elements of fraud, malice, or gross negligence, or oppression, enter into the injury, the jury may award exemplary or vindictory damages.⁵ It will, therefore, be error for

¹ *Hovey v. Thompson*, 37 Ill. 538.

² *Smith v. Curtis*, 5 Allen, 367.

³ *Holmes v. Watson*, 29 Penn. St. 457.

⁴ *Weber v. Kingsland*, 8 Bosw. (N. Y.) 417. See, as to damages in case of slander, *Baker v. Young*, 44 Ill. 43; as to eminent domain, in case of false computation, *Oswald v. Kennedy*, 48 Penn. St. 9; in an action on a guaranty, *Jones v. Post*, 6 Cal. 102; in reference to costs, *Waffle v. Dillenback*, 38 N. Y. 53; *Cleveland, &c. R. R. Co. v. Bartram*, 11 Ohio N. S. 457.

⁵ *Polk v. Fancher*, 1 Head, 336; *Carter v. Peck*, 4 Sneed, 208; *Cole v. Tucker*, 6 Tex. 266; *Hodgson v. Millward*, 3 Grant (Pa.), 406; *Dibble v. Morris*, 26 Conn. 416; *Ousig v. Hardin*, 23 Ill. 403.

the judge to instruct as to exemplary damages in cases where these elements do not enter, but if the judge use the term "exemplary damages," and it appear the jury were not misled, so as to award more than the proper damages, it will not be error.¹

In breaches of promise to marry, the court properly instructs the jury to give exemplary damages, if accompanied by seduction.²

In a case of trespass for wantonly maiming and disfiguring the plaintiff, an instruction for exemplary and primitive damages is properly given to the jury.³

A charge that vindictive damages cannot be given for trespass on land, unless the trespasser entered the land maliciously, in a rude, aggravating, or insulting manner, erects too strict a standard of liability. For trespasses may be so wantonly and recklessly committed as to justify the imposition of vindictive damages without any evidence of actual malice.⁴

Where a court in charging the jury that they might give exemplary damages in trespass if they found it attended by circumstances of aggravation, playfully remarked: "Such damages as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others," it was held error.⁵

In an action for malicious prosecution, it is error to charge the jury: "You may give what is called vindictive damages; that is, such damages as will satisfy the highly excited feelings of the party injured."⁶ So, an instruction in an action against a street railway company for damages sustained by a passenger, that "if the negligence of the driver was gross, the jury should find exemplary damages, in their discretion, beyond the actual injury sustained, for the sake of the example and punishment for such gross negligence," is error.⁷

¹ *Blot v. Boiceau*, 3 N. Y. 78; *Robinson v. Parnell*, 16 Tex. 382. But see *Pickett v. Crook*, 20 Wis. 358; *R. R. Co. v. Manley*, 58 Ill. 304.

² *Goodall v. Thurman*, 1 Head, 209; *Coryell v. Colbaugh, Coxe* (N. J.), 77; *Ball v. Bruce*, 21 Ill. 161; *Stevenson v. Belknap*, 6 Iowa, 97.

³ *Pike v. Dilling*, 48 Me. 539; *Foot v. Nicholls*, 28 Ill. 486.

⁴ *Devaghna v. Heath*, 37 Ala. 595; *Jennings v. Maddox*, 8 B. Mon. 430; *Farwell v. Warren*, 51 Ill. 467; *Green v. Craig*, 47 Mo. 90.

⁵ *Hair v. Little*, 28 Ala. 236.

⁶ *Jones v. Turpin*, 6 Heisk. 181.

⁷ *McKeon v. R. R. Co.* 42 Mo. 79.

PART III. MODE OF GIVING INSTRUCTIONS.

§ 344. **Reading Extracts.** — In discharging the important function of instructing the jury on the law, a court may avoid some of the errors and mistakes pointed out in the previous sections, and yet fail to adequately discharge its duty. The statement of the law may be given in such a manner as to be beyond the comprehension of the jury, in a too technical or in an indirect manner.¹ Something more is required from a court than mere abstract statements of law; there is required an exposition of the law pertinent to the case before the jury, in its adaptation as well as exceptions.

The practice of reading sections of a law from a text-book or report is condemned as likely to embarrass and befog the jury. In a case it is said: "Apart from the statute which directs in what manner instructions may be asked, and does not sanction the mode proposed, the manner of asking the instructions, in this instance, was novel and unprecedented; and was calculated to create the apprehension that counsel desired rather to bewilder and mislead, than to enlighten the jury as to their duty. With equal propriety might counsel have asked of the court to give in charge to the jury the entire law or volume of laws, in which the provisions referred to were contained."²

In another case, when the counsel for either party read written requests to charge in the presence and hearing of the jury, the court held up the paper containing the requests to charge, saying: "Gentlemen, I give you all these in charge as requested." This was held to be an improper mode for instructing a jury.³

It is not, however, improper that a charge gives a definition

¹ The court say, in criticising a charge in a criminal case: "The charge of his honor is very elaborate and learned. He enters into and discusses fraud and felony. His distinctions are well and ably drawn, and to minds practised in such discussions, easy of comprehension, but incapable of being understood by the ordinary class of jurors whose minds are not trained in scholastic learning." *Lancaster v. State*, 3 Cold. 343.

² *Ryan v. Jackson*, 11 Tex. 391. In New Jersey it was held not to be error where a justice, instead of charging the jury, read the statute and gave it to the foreman. *Pullen v. Boney*, 4 N. J. L. 125.

³ *Leaprot v. Robertson*, 44 Geo. 46.

in the very words of a statute, if afterwards its legal meaning and effect be explained.¹

Where a case was reversed for the exclusion of evidence, and at the subsequent trial the judge read the opinion of the court in reversal, and then told the jury the case did not differ so much from what was before submitted, it was held erroneous.²

But it is held not to be improper to employ the language of the higher court in a particular application to the case at bar; and it is even held error to refuse to do it when so requested.³

§ 345. **Conflicting or inharmonious instructions** are often condemned, and are made a cause of reversing a judgment. This often occurs in lengthy charges, when different requests are embodied at the instance of both parties. Thus, in an action on a warranty of the genuineness of the indorsement on a note sold by the defendant to the plaintiff, in which the defendant contended that the plaintiff knew that he was acting as agent for a third party, the judge instructed the jury that the plaintiff was bound to show that he was ignorant that the defendant was dealing for a third party, and that if he failed to do this, or if the jury were unable to say on the whole how this was, the plaintiff was not entitled to recover. It was held that this instruction was misleading, though in other parts of his charge the judge stated the law correctly.⁴

In *Vanslyck v. Mills*⁵ the court say, in reference to such instructions in that case, which arose from combining various requests: "Upon a first reading they appear, and upon close inspection and critical examination they will be found, to be in conflict with each other, singly and collectively; or, at the very

¹ *Colvin v. Warford*, 20 Md. 357.

² *Dimes Sav. Inst. v. Allentown Bank*, 61 Penn. St. 391.

³ *Hood v. Hood*, 25 Penn. St. 417; *Pugh v. McCarty*, 44 Geo. 383; *Benedict v. Haggin*, 2 Cal. 385. In a Vermont case the practice of reading from books is emphatically condemned. *State v. McDonnell*, 32 Vt. 491. In a railroad case the judge read the entire syllabus of another like case, and told the jury that was the law to be applied; it was held error. *Stucke v. R. R. Co.* 9 Wis. 182. And the court very properly denied a request of counsel embodying an extract from *Greenleaf's Evidence* on the nature of confessions. *State v. Turner*, 19 Iowa, 144.

⁴ *Wilder v. Cowles*, 100 Mass. 487.

⁵ 34 Iowa, 375.

best that can be said for them, and putting it in very mild language, they are inharmonious and misleading. Where instructions of such character are given, it is sufficient reason for reversing a judgment.¹

§ 346. **Uncertain or Ambiguous Instructions.** — It is the duty of counsel to ask for more accurate or specific instructions when they deem those given objectionable on the ground of uncertainty. It is believed, where no objection is made at the time, that this will not be sufficient to reverse a judgment. But if the request be not heeded, then an exception should be made to the charge, because of ambiguity or uncertainty, on which to base a motion for a new trial.

It is of the first consequence, in every case, that the principles of law applicable thereto should be so plainly stated to the jury that they are thereby enabled to comprehend them.²

The court should be particularly careful in regard to definitions. Thus, a charge that "if through a present exciting fear a person was forced" to take Confederate money, the payment would not be binding, was held to be erroneous, because the judge failed to give the jury a definition of the word "fear," as used in this sense.³

So, in the same State, a judge charged: "When there is conflicting testimony, it is for you to determine under your oath, whom, and what testimony, you will believe," and omits to instruct them as to what rules should be observed in weighing testimony.⁴ Ordinarily a charge like this would not be objectionable; but under the special circumstances of that case it may properly have left the jury in uncertainty. There was, in the case, much opposing testimony; several witnesses were impeached, and the jury, it was held, needed, therefore, instruction as to the means of weighing evidence, the various

¹ See *Davis v. Strohm*, 17 *Ibid.* 421. So, in *Chicago, &c. R. R. Co. v. Payne*, 49 *Ill.* 499, it is held not sufficient that a part of the instructions contain a correct exposition of the law, if it is incorrectly announced in others. In *Clem v. State*, 31 *Ind.* 480, it is held that the court errs when giving instructions apparently conflicting, leaving the jury to conjecture which of them should be applied to a given state of facts. To the same point, *R. R. Co. v. Stallman*, 22 *Ohio N. S.* 1.

² *Watkins v. Wallace*, 19 *Mich.* 57.

³ *Rollings v. Cate*, 1 *Heisk.* 97.

⁴ *Wilcox v. State*, 3 *Heisk.* 110.

circumstances to be considered in estimating its credit, and other *criteria* which might aid them in forming a conclusion.¹

In the mistaken application of a word, an error may be made so as to mislead a jury, as using the word "executed" in the sense of "delivered."² So, when the expression was used that certain circumstances were "evidence of fraudulent intent on the part of the plaintiff," it was held calculated to mislead the jury, without giving them to understand the nature of such evidence.³

In the following case the instruction was held ambiguous: "If the jury find from the evidence that the contract was never delivered so as to become a fully completed contract, &c." On which the court remark: "What is meant by the expression 'never delivered so as to become a fully completed contract?' Was it intended to ask the jury to find that the contract was never delivered? If so, why not stop there? And besides, if it was never delivered, why ask the jury to further find whether its terms were complied with?"⁴

§ 347. Long and verbose instructions are particularly reprehensible, as tending to bewilder the jury, and are generally condemned.⁵

Instructions are best when concise and simple, thereby presenting the case in its simplest aspect to the jury. Of this quality a court says: "Few instructions are drawn so that a

¹ We cannot help remarking that this case holds extreme views in regard to the duty devolving upon a judge. Were there no other errors than this in a charge, we do not think it would be sufficient elsewhere to reverse a judgment, especially when it passed without an exception. The tendency has been too great to seize upon every trivial omission in a charge as a ground for a new trial, but unless there is manifest error, it ought not to be encouraged.

² Ward v. Churn, 18 Gratt. 801.

³ Gillett v. Phelps, 12 Wis. 392.

⁴ Chickasaw Co. v. Pitcher, 36 Iowa, 593. For other instances where instructions have been held erroneous on account of ambiguity, see Trustees v. Hubble, 62 Ill. 161, where it is said: "They," the jury, "were left to wander in a field of too much conjecture and indefiniteness in finding whether the defendants had ignored their obligations under the contract." People v. Hobson, 17 Cal. 424; Comstock v. Smith, 26 Mich. 306; Haskins v. Haskins, 9 Gray, 390.

⁵ In the celebrated Tichborne case in England, the chief justice made the most elaborate charge on record, taking up eighteen days (Am. L. R. Ap. 1874). In the case of Tilton v. Beecher, after a trial of six months, the judge's charge occupied twenty minutes, and its conciseness and style have been commended.

hypercritical reader may not find some fault, or to which further explanations might not be given, which would make their real meaning more full or apparent to the uninformed. 'Want of care' means, want of reasonable and proper care. Those words are implied and understood by the ordinarily intelligent reader or hearer. But few sentences are ever framed, in our language, where some words are not implied; and especially is it so in the composition of our ancient law writers, whose ideas are conveyed in the fewest words possible; and it is for this peculiarity that their writings have been so universally and justly admired."¹

§ 348. To be given in Open Court. — The law strictly requires that instructions shall be given in the presence of both parties in open court. Thus, after a jury had retired to consider their verdict, the judge sent them an answer to an inquiry without the knowledge of either party. This was held error.²

Jurors should not separately communicate to or with the court, in writing or verbally, in reference to any matter belonging to the case; they should be brought before the court in a body.³ But it is not unusual to give them papers with the consent of both parties; to do so, however, in their absence, is error.⁴

So, after the jury have retired, it is error to allow them to come into court and instruct them in the absence of the parties or their counsel; and such instructions will be considered important if the contrary is not shown, from the fact that the jury have asked for them.⁵

So, it is error for the court to furnish the jury a copy of the statutes of the State while they are out of court deliberating upon their verdict, that they may read certain provisions designated by the court touching the case under consideration.⁶

But where it appeared that the jury were allowed, during the intermission of court, to occupy the court-room, and that

¹ Warner v. Dunnavaan, 23 Ill. 380.

² O'Connor v. Guthrie, 11 Iowa, 80.

³ Fisher v. People, 23 Ill. 283.

⁴ Campbell v. Beckett, 8 Ohio N. S. 210.

⁵ Redman v. Gulnac, 5 Cal. 148.

⁶ State v. Patterson, 45 Vt. 308.

having accidentally got possession of the judge's minutes of the evidence, they read them, but that they were not in any way affected thereby, it was held not sufficient to set aside the verdict.¹ And although the right to communicate with the jury during their deliberations, to withdraw from their consideration erroneous instructions, and to give additional ones, strictly applies only to proceedings done in open court, slight deviations from this rule do not necessarily vitiate a verdict.²

In one case a new trial was refused on account of the repetition of the charge to the jury during the recess of the court, though the parties were absent.³

§ 349. **Written Instructions.** — In a great many of our States — particularly in the Western — requests and instructions are required to be in writing, in order to prevent uncertainty as to their precise language and terms. In such places it is erroneous to give oral instructions, except with the consent of the parties.⁴ In practice, it happens that this rule gives rise to much inconvenience; for there must be many occasions when instructions are required in answer to an interrogatory of the jury or a party which ought not necessarily to be put in writing, as in the case of a simple affirmative or negative answer to an inquiry. In some places the strictness of the statute has been unfavorably commented on because of this inconvenience.⁵

In some States the instruction is given in writing at the request of a party.⁶

In Maryland, when an oral charge is first given, either party may have it reduced to writing, in order to except to it.⁷

The practical question for consideration is to know when the

¹ *Chapman v. R. R. Co.* 26 Wis. 295.

² *Hall v. State*, 8 Ind. 439.

³ *Bassett v. Salisbury* 8 Fost. 438.

⁴ Under the terms of the Missouri statute, the parties or their counsel cannot consent to oral instructions; they must be in writing. *State v. Cooper*, 45 Mo. 64.

⁵ *Ray v. Wooters*, 19 Ill. 82; *Edgar v. State*, 43 Ala. 53.

⁶ As in Indiana; *Meredith v. Crawford*, 34 Ind. 399; *Pate v. Wright*, 30 Ind. 479. Iowa; *Stratton v. Paul*, 10 Iowa, 140. Wisconsin; *Hasbrouck v. Milwaukee*, 21 Wis. 238.

⁷ *Smith v. Crichton*, 33 Md. 103.

rule may be infringed, what words or acts of the court may be considered as within the inhibition of the statute. Now, some courts have adopted a strict interpretation, and have held it error to give any direction whatever other than in writing; while others have taken a more liberal view, and in case of a simple affirmative or negative reply to a question, have held it no error to omit putting it in writing. This last view would seem to be the more rational.

§ 350. Application of the Rule. — In a case in Kansas, the court was requested to instruct the jury in writing; it was so done, and also, at the request of the defendant, they were instructed in writing to make certain special findings. They retired to consider their verdict, and afterwards returned into court, but the special findings were not signed. The court then instructed the jury *orally* to make said special findings, and to sign the same, but did not instruct the jury upon the *merits of the case or upon the law*; and it was held that the court did not err in giving these oral directions.¹

And where, after the jury had been charged, a juror asked a question as to the rights of the parties, to which a negative answer was given without being reduced to writing, it was held no violation of the statute.² The court say in this case: "Suppose the circuit judge had answered the question by the monosyllable 'no,' which, indeed, was all his answer amounted to. Will it be claimed that before he could answer he must write the word 'no,' and then read it to the jury? We think it quite safe to say that the statute never contemplated any such thing."

Where the court had given instructions for both parties, and gave an instruction on its own motion, it was error to preface it by the oral remark, in the presence and hearing of the jury, that he had concentrated all there was in those instructions into this one, as embodying all the law necessary for the case, when it did not, in fact, present all the law of the case, and withdrew from the consideration of the jury evidence that was before them.³

¹ Prater v. Sneed, 12 Kan. 447.

² Millard v. Lyons, 25 Wis. 516.

³ McEwan v. Morey, 60 Ill. 32.

In California the court has no right to instruct the jury orally without the consent of the prisoner. The fact that the judge told the prisoner's counsel, after the charge was given, that he would put his charge in writing, if desired, does not help the case.¹

In Alabama, where the statute is very peremptory in its terms, it was held not to be error to refuse giving a charge on request, which was not in writing, and that it was proper to refer to the previous charge, as giving the judge's views on the points of law requested.²

IV. DIRECTING A VERDICT.

§ 351. Grounds on which exercised. — The power is vested in the court to determine whether any evidence offered *tends* to support the allegations of a party, and whether sufficient facts have been proved to support a cause of action or a defence; and in the exercise of this power it is within the acknowledged province of the court to direct the jury to give a verdict for a party under certain circumstances. This power was sometimes exercised in an arbitrary manner, often causing irreparable injustice when the right of appeal was limited or denied, as it was formerly. Now there is not such danger of injustice, as the action of the court in directing a verdict is

¹ *People v. Ah Fong*, 12 Cal. 345.

² *Milner v. Wilson*, 45 Ala. 478. From these illustrative cases, it may be inferred that where a statute requires a charge to be in writing, any oral instruction conveying information on the law bearing on the case cannot be given except by the consent of the parties, and cannot then if it is prohibited by statute, as in *Missouri*; that the statute is not infringed by simple responses to questions of inquiry from the jury, if not in writing, and that the statute is more strictly applied in criminal cases, as appears from the California case, *supra*.

In Ohio the statute requires that an oral charge shall, upon application by either party be reduced to writing before the jury retires to consider their verdict. *Harvey v. Turney*, 9 Ohio N. S. 400. In Kentucky oral declarations of the court, which are virtual instructions, are illegal according to the criminal code. *Coppage v. Commonwealth*, 3 Bush, 532.

In Florida requests are to be presented in writing, and then the judge is to "declare in writing his ruling thereon as presented, and pronounce the same to the jury as given or refused," and write out also and deliver to the jury his own ruling of the law upon the points raised.

It was held no violation, where there was a request for a written charge, for the judge to repeat orally a part of one of the instructions, and then in reading another, to remark orally, that he had not intended to read so far, and re-read it as he had intended to give it. *Pate v. Wright*, 30 Ind. 476.

subject to review in the higher courts. However, the right ought to be cautiously exercised for the sake of the inconvenience and delay to which a party may be subjected; but on some occasions it is the duty of the court, at the instance of a party, to direct a verdict, and a failure to do so in a clear case will be error; for it is not only the right but the duty of the court to inform the jury when there is no evidence.¹ Thus, in an action for damages, the non-responsibility of the defendant for the injuries complained of was established by uncontradicted evidence, and the court refused to instruct the jury to find as in the case of a nonsuit, and the refusal was held error.²

§ 352. *When directed.*—When the plaintiff has introduced his evidence, and it does not tend to prove the plaintiff's cause of action, the court may refuse to hear evidence offered by the defendant, and direct the jury to find against the plaintiff.³ But it is only in the absence of all evidence against the defendant that the court should direct a verdict in his favor.⁴ So, where in an action by the assignee of an insolvent debtor to recover back money paid by the insolvent to a creditor by way of preference, there is no evidence tending to show that the defendant was aware of any fact indicating the debtor's insolvency, a verdict may properly be directed for the defendant.⁵ And if the written contract sued on is void on its face by the statute of frauds, the jury may be instructed, in terms, to find for the defendant.⁶ Where issue has been joined on the plea *non est factum*, and no evidence is offered of the execution of the instrument declared on, the jury ought to be instructed to find for the defendant.⁷

The right to direct a verdict is more frequently exercised after the evidence on both sides is submitted, when, if the

¹ *Hynds v. Hays*, 25 Ind. 31; *Clark v. R. R. Co.* 36 Mo. 202; *Storey v. Brennan*, 15 N. Y. 524.

² *Parker v. Jenkins*, 3 Bush (Ky.), 587.

³ *Steinmetz v. Wingate*, 42 Ind. 574; *Singleton v. R. R. Co.* 41 Mo. 465; *McCracken v. Roberts*, 19 Penn. St. 390; *Parker v. Leman*, 10 Tex. 116.

⁴ *Mullaly v. Austin*, 97 Mass. 30.

⁵ *Everett v. Stowell*, 14 Allen, 32.

⁶ *Rigby v. Norwood*, 34 Ala. 129.

⁷ *Kerley v. West*, 3 Litt. (Ky.) 362.

facts proved clearly fail either to establish a cause of action or a sufficient defence in point of law, the court may properly direct the jury as to their verdict.¹

It is error for the court, after the submission of the evidence, to instruct the jury that "the plaintiffs are not entitled to recover in any event, and if the issues were found in their favor, he would set aside the verdict;" and afterwards to submit the issues to be passed upon by the jury "to say how the matter was."² The court, reviewing this instruction, say: "This manner of submitting the issues was calculated to throw the jury off their guard, and to prejudice the rights of the plaintiff. Why consider the evidence with that care and attention which properly belongs to all jury trials, if their findings are to have no weight with the court, but are to be set aside in any event?"

§ 353. *Directing a Verdict in a Criminal Case.* — There is not general acquiescence as to the right of the court to direct a verdict of acquittal in a criminal case; for some contend it should therefore have as much right to direct a verdict of guilty, which the court cannot do. But on principle there ought to be no question as to the power of the court in certain cases to direct a verdict of acquittal; for it is nothing but a question of law, proper for the court to determine, whether when certain evidence has been offered, it is in point of law sufficient to establish the guilt of the accused. Suppose it were attempted to convict a person of perjury, and that the necessary evidence was not produced, would it not be in the power of the court to direct an acquittal? And there are many other cases where it will not only be in the power of the court, but it will be its duty to declare the evidence insufficient, and direct a verdict of acquittal. So it is held that it is the duty of the court, where the evidence does not establish the guilt of the accused, to direct a verdict of acquittal.³ In

¹ *Saville v. Lord Farnham*, 17 Eng. C. L. 301; *Nicholls v. Goldsmith*, 7 Wend. 160; *Grand Trunk R. R. Co. v. Nichol*, 18 Mich. 170; *Callahan v. Warne*, 40 Mo. 131; *Corning v. Troy Factory*, 44 N. Y. 577; *Thomasson v. Groce*, 42 Ala. 431; *Cutler v. Hurbert*, 29 Wis. 152; *Piersol v. Neill*, 63 Penn. St. 420.

² *Dula v. Young*, 70 N. C. 450.

³ *State v. Daubert*, 42 Mo. 242; *State v. Martin*, 70 N. C. 628; *People v. Bennett*, 49 N. Y. 137.

the trial of an indictment for an assault and battery with the intent to commit a rape, if the evidence is clearly insufficient to warrant or justify a conviction, it is the duty of the court, at the request of the prisoner, to direct an acquittal, and a refusal to do so is error.¹

§ 354. A proper test as to the propriety of directing a verdict is held to be, that if the verdict would on appeal be evidently set aside as against the weight of evidence, the court should direct a verdict for the party entitled to it. Thus, it is said in a Wisconsin case:² "Such a direction is always proper, when if submitted to a jury a contrary verdict would be set aside as against the weight of evidence." In another case it is held that "a judge is not bound to submit a question of fact to the jury, when their verdict, if contrary to his views of the testimony and its legal effect, would be certainly set aside as against law and evidence."³

It is always error to leave a question to the jury in respect to which there is no evidence; if there is none to support the theory of fact assumed, the court should not let the case go to the jury.⁴

So, it is held that when the facts in a case are undisputed, and the evidence with all the inferences which a jury can rightfully draw from it does not, as a matter of law, have any tendency to establish a proposition essential to the maintenance of the action, it is the duty of the judge so to instruct the jury.⁵

§ 355. When it is Error. — If there is evidence which in any way tends to establish the plaintiff's cause of action, or the defendant's case, it is erroneous for the court to withdraw the case from the jury, or direct a verdict; because it is not for the court to judge of the *sufficiency* of the evidence.⁶

¹ Reynolds v. People, 41 How. Pr. 179.

² Dryden v. Britton, 19 Wis. 22.

³ Godin v. Bank, 6 Duer, 76; Stuart v. Simpson, 1 Wend. 376.

⁴ Ins. Co. v. Baring, 20 Wall. 159. In this case the Supreme Court very clearly sums up the duty of the court as to instructions in certain circumstances. To the same point, Algur v. Gardner, 54 N. Y. 360.

⁵ Lane v. R. R. Co. 14 Gray, 143.

⁶ Stephens v. Brooks, 2 Bush (Ky.), 137; Way v. R. R. Co. 35 Iowa, 585;

Thus, upon the question whether promissory notes given by the plaintiffs to the defendant were given in payment of a debt, or as a loan, the fact that the plaintiffs have made payments upon such notes to the defendant as *owner* and *holder*, upon demand of payment as a matter of right, is a circumstance worth considering by the jury, and it was improper therefore to direct a verdict.¹

The true test is thus stated: It is error to direct a verdict for the plaintiff where the defendant had a case, had it not been for plaintiff's testimony.²

In an action against a railroad company for killing animals found on the track, it was proved that the engineer had omitted a manifest duty; and a verdict was directed for the plaintiff; this was held error, because there was no testimony that the action complained of was occasioned by the engineer's omission of duty, and inferences of fact must be left to the jury, and the court are not to draw such conclusions unless the case is within the operation of some legal presumption.³

So, in cases of circumstantial evidence the court must be careful not to direct a verdict where there are any circumstances tending to explain, or contradict, or rebut other circumstances in favor of or against a party. The duty of the court in such a case is thus explained by the Supreme Court of North Carolina: "When the evidence is direct so as to leave nothing to inference, and the evidence if believed is the same thing as *the fact* sought to be proved, the judge is at liberty to instruct the jury, that if they believe the witness they should find for the plaintiff, or for the defendant. . . . Where the evidence is altogether circumstantial, and that offered on the other side tends to explain it, or to rebut the inferences, or to contradict some of the witnesses, because the main purpose is not accomplished," the judge ought not to direct the jury as to their verdict.⁴

Drakeley v. Gregg, 8 Wall. 242; Henry v. Rich, 64 N. C. 379; Hichman v. Jones, 9 Wall. 197; Barney v. Schneider, Ibid. 248; Kelsey v. Oil Co. 45 N. Y. 505.

¹ Fish v. Davis, 62 Barb. 122.

² Hill v. Canfield, 56 Penn. St. 454.

³ Memphis, &c. R. R. Co. v. Bibb, 37 Ala. 699.

⁴ Gaither v. Ferebee, Winston's Law, 310.

§ 356. It may be directed under a hypothesis; as where the only witness in a case swore that the defendant had admitted the correctness of the account sued on, and had promised to pay it, it was held no error when the court instructed the jury to find for the plaintiff if they believed the witness.¹

Thus, in an action on a promissory note, the defence was a denial of execution. The plaintiff testified that he took the note to the defendant, when the latter said it was all right, and promised to pay it. This the defendant denied. There were no other witnesses in the case; and it was held no error for the court to instruct the jury for the defendant, that if the evidence was equally balanced they should find for the defendant. The instruction is not open to the objection that it tended to mislead the jury into the belief that they were to find for the defendant if an equal number of witnesses testified on each side, as an equal balance of testimony does not refer to the number of witnesses, but to the equal weight and credit of testimony, which is properly in the province of the jury.²

So, it is not error to instruct the jury that if the testimony of a particular witness be believed by them, their verdict must be rendered in favor of the party whose theory has been sustained by it, provided none of the other testimony be withdrawn by the court from their consideration, and the case is submitted as the parties have presented it.³ An instruction, that if the testimony going to impeach the credibility of the only witness was so strong as to satisfy their minds that they could not believe anything she had testified to, they should find for the defendant, was correct.⁴

But an instruction to find for the plaintiff if the jury believe the evidence, is erroneous, if there is anything in the evidence, or lawfully to be inferred from it, to hinder the plaintiff's recovery.⁵

§ 357. In Cases of Contributory Negligence. — The right

¹ *Terry v. Sickles*, 13 Cal. 427; *Beckman v. McKay*, 14 Ibid. 250.

² *Bridenthal v. Davidson*, 61 Ill. 460.

³ *Thompson v. Franks*, 37 Penn. St. 327.

⁴ *Spivey v. State*, 8 Ind. 405.

⁵ *Wiggins v. Holley*, 11 Ind. 2.

of directing a verdict is often exercised in actions for negligence, where the plaintiff's own conduct directly contributed to the injury complained of.¹ When this appears, the court will usually instruct the jury to bring in a verdict for the defendant.²

Thus, it is contributory negligence in a traveller crossing a railroad not to stop and look up and down for an approaching train, and in such a case the court may properly direct a verdict for the defendant. But when there are any inferences to be drawn from facts it is improper for the court to direct a verdict in a case of negligence.³

Thus, where it is necessary to determine what a man of ordinary care and prudence would be likely to do in a certain emergency, where many circumstances have to be considered, it should be left to the jury.⁴

In an action brought by a servant against his master to recover for personal injuries received by him in breaking and falling through a floor in his master's shop, over which it was his duty to pass, and it appeared that he knew that the floor was decayed, and that there were holes in it; but it did not appear that he could have ascertained that the place where he broke through was dangerous without examining parts of the floor not open to his inspection; it was held that it was not for the court to say he was guilty of negligence, and the question was for the jury.⁵

¹ For further information on this subject see chap. 6.

² *Allyn v. R. R. Co.* 105 Mass. 77; *N. Jersey Ex. Co. v. Nichols*, 4 Vroom, 434; *Cleveland, &c. R. R. Co. v. Terry*, 8 Ohio N. S. 570; *Smith v. Smith*, 2 Pick. 621; *Newhouse v. Miller*, 35 Ind. 463.

³ *Morse v. R. R. Co.* 65 Barb. 491; *Stubble v. London, &c. Co. L. R. 1 Exch.* 13.

⁴ *Bernhard v. R. R. Co.* 1 Abb. (N. Y.) App. Dec. 131.

⁵ *Huddleston v. Machine Shop*, 106 Mass. 232.

CHAPTER IX.

PROVINCE AND DUTY OF THE JURY.

§ 358. Scope of the Present Inquiry.

PART I. IN RESPECT TO THE ISSUE.

- § 359. Duty generally.
- § 360. Determination of Facts.
- § 361. Credibility of Witnesses.
- § 362. Court may properly charge in Reference to.
- § 363. The General Rule.
- § 364. Bad Reputation of a Witness.
- § 365. Accomplices.
- § 366. Confessions.
- § 367. In Cases of Conflicting Evidence.
- § 368. The Sufficiency and Weight of Evidence.
- § 369. Personal Knowledge of Jurors.
- § 370. Permitting the Jury to view Premises.
- § 371. Assessment of Damages.
- § 372. The Tendency to limit this Power.
- § 373. Right to decide the Law — how far claimed.
- § 374. The Power of Attaint.
- § 375. *Power* as distinguished from the *Right*.
- § 376. The Preponderance of Judicial Authority.
- § 377. Views in regard to in New England States.
- § 378. In New York.
- § 379. In Pennsylvania.
- § 380. In the Western States.
- § 381. In the Southern States.
- § 382. In Indictments for Libel.
- § 383. Fox's Libel Act.
- § 384. Effect of the Act.
- § 385. Views in the United States.

PART II. IN RESPECT TO THEIR GENERAL DEMEANOR.

- § 386. What the Law requires in Jurors.
- § 387. On the Trial Juror sleeping.
- § 388. Expressions in Regard to the Parties or Issue.
- § 389. Must be such as to indicate a Previous Conviction.
- § 390. Conversation in Regard to the Case.
- § 391. Conversation with the Officer in charge.
- § 392. Obtaining Information Outside of the Evidence.

- § 393. When the Information comes from a Fellow Juror.
- § 394. Separation of the Jury during the Trial.
- § 395. The Prevailing Doctrine.
- § 396. Separation fatal to Verdict in some States.
- § 397. After retiring cannot separate before agreeing.
- § 398. Jurors drinking Intoxicating Liquors.
- § 399. Views in the United States.
- § 400. Early Cases in New York.
- § 401. In New Hampshire and Massachusetts.
- § 402. In several Southern States.
- § 403. In the Western States.
- § 404. Taking Papers or Books to Jury Room.
- § 405. Where no Injury can result.
- § 406. Determining Verdict by Chance.
- § 407. Where no previous Agreement to be bound.
- § 408. Affidavits of Jurors in regard to Verdict.
- § 409. Affidavit made subsequent to the Trial.
- § 410. Received in Support of a Verdict.

§ 358. Scope of the Present Inquiry. — In many places in a previous part of this work the duty devolving on the jury in the course of a trial has been incidentally referred to; and in the last two chapters especially this subject was necessarily considered in a general way; it is now proposed more particularly to examine the province and duty of the jury from the inception of the trial to its final determination. The subject shall be considered under two divisions:

- I. With respect to the issue.
- II. With respect to their general demeanor.

I. IN RESPECT TO THE ISSUE.

§ 359. Duty generally. — It is the acknowledged duty of the jury to determine the facts involved, as an inference from the evidence produced before them — this is peculiarly their province; to judge of the credibility of the witnesses; and as a necessary consequence of these powers, to judge of the sufficiency and weight of the evidence.¹ With respect to their duty in criminal cases to determine the law as well as the

¹ When the question is one of fact about which different minds may honestly differ, it is the province of the jury ultimately and definitely to decide. Upon them the Constitution and the laws have placed the responsibility, and upon them it must rest. . . . The credit due to different witnesses, and more especially the weight due to the opinions of witnesses, who speak to the point of reasonableness, are questions peculiarly fit for the consideration and decision of a jury. *Coffin v. Ins. Co.* 15 Pick. 295.

fact, there is a wide divergence of opinion, which will be presently shown.

There is a further duty of a personal nature. It is required of jurors that they shall exhibit during their service on the trial a due regard for the responsibilities devolving upon them; that in their language and conduct they shall evince attention to and respect for their important duties; and a failure to observe this propriety of demeanor will, in many instances, render their labors nugatory.

§ 360. The determination of the facts involved in the issue, upon the evidence produced, is the prominent and characteristic duty of the jury. The law cannot lay down rules for this purpose; its sphere is to apply rules as to the nature of the evidence to be used to ascertain these facts, and to apply legal consequences to these facts when ascertained. The ability to distinguish between truth and falsehood does not depend so much upon the application of artificial and technical rules, as it does upon the exercise of that experience and observation possessed by intelligent minds which we presume the jury to bring to the discharge of their functions. "Although all questions of pure fact belong peculiarly to the province of the jury, who are to be guided in their decision by their conscientious judgment and belief, yet it is to be recollected that in many instances the effect of particular evidence is the subject of legal definition and cognizance, as in the cases of all legal presumptions resulting in particular facts. . . . Juries are bound by all the rules and presumptions of law as far as they apply."¹

§ 361. The credibility of a witness is for the determination of the jury, and only in extreme cases will an appellate court interfere with a verdict turning upon the credibility of witnesses who testified upon the trial.²

So, any instruction that infringes on this province of the jury will be error; as in a trial for seduction, when the jury were told, "that if they find that the testimony of the plain-

¹ Stark. Ev. 814.

² Whitten v. State, 47 Geo. 297; Von Glahn v. Von Glahn, 46 Ill. 134; Dunn v. People, 29 N. Y. 523.

tiff is the only positive evidence of material allegations, and that her evidence is contradicted in all the material points by an unimpeached witness, then the jury must find for the defendant." The court say in reference to this: "This instruction was clearly erroneous. The jury are the proper judges of the credibility of witnesses, under the legal rules to be given them by the court."¹

§ 362. Court may properly charge in Reference to. — It is not easy to fix the respective functions of the court and jury in all cases as to the credibility of witnesses. It would be manifestly erroneous to assert that the jury are to judge of this credibility according to their own will unrestrained by any rules or directions.² In a note in the last section, we have shown what rules the law has adopted for guidance in this matter, and if such rules are openly disregarded, it cannot be maintained that the jury have properly exercised the function committed to them. It must, therefore, follow that the jury are to exercise this duty under the direction of the court, which is bound to so instruct when requested. Thus, where a party who received money at a bank without counting it himself, brought an action against the bank for paying him a less sum than was intended. The deficiency was not discovered until the second day after the money was received, the party alleging the mistake having in the mean time paid out and received different sums. It was held error to refuse to instruct the jury, on behalf of the bank, that in estimating the credibility of the two witnesses, the plaintiff and the

¹ *Delvee v. Boardman*, 20 Iowa, 448. As to these rules a standard authority gives them as follows: The credit due to the testimony of witnesses depends upon, 1st, their integrity and honesty; 2dly, their ability; 3dly, their number and the consistency of their testimony; 4thly, the conformity of their testimony with experience; and 5thly, the coincidence of their testimony with collateral circumstances. *Stark. Ev.* p. 820. A charge, that if the witnesses were of equal respectability and means of knowledge, where the evidence as to credibility was conflicting, that the case stood as if no impeachment had been attempted, and leaving to the jury to say whether the witness was impeached or not, is not erroneous. *Bakeman v. Rose*, 18 Wend. 146. As to inconsistent statements, see *Gilbert v. Sage*, 5 Lans. 287.

² A jury cannot wilfully, or from mere caprice, disregard the testimony of an unimpeached witness. While a jury may judge of the credibility of a witness, they must exercise their judgment while doing so, and not their will merely. *Robertson v. Dodge*, 28 Ill. 161.

officer of the bank who paid him the money, and probability as to which of them made the mistake, the latter in counting, or the former in taking care of the money, the jury might take into consideration their appearance on the stand, their business competency, care, and habits, as disclosed by the evidence.¹

So, in instructing a jury as to the tests of the credibility of witnesses, it is not error to say that "an interested witness will not usually be as honest and candid as one not so."² But it is error to instruct the jury that the witness who has the *most interest* in noticing and remembering the facts about which he testifies is to be preferred.³

Fair inferences from evidence, founded upon the natural course of business and of human experience, are as much evidence as the principal facts from which these deductions flow; and as such may properly be suggested by the court to the jury.⁴

§ 363. The general rule, that where unimpeached witnesses testify positively to a fact, and are uncontradicted, the jury are not at liberty to discredit their testimony, is subject to exceptions; as, where the statements of the witness are grossly improbable, or he has an interest in the question at issue.⁵

However well settled the rule may be that the credibility of a witness is for the jury, the judge has power to instruct them as to what circumstances are to be unfavorably considered in their estimation of his evidence.⁶ So the testimony of a witness may be wholly rejected by a jury, if from his manner and the improbability of his story or his self-contradiction in the several parts of his narrative, the jury become convinced that he is not speaking the truth; and this is true although he be not attacked in his reputation, or contradicted by other witnesses.⁷

¹ First Nat. Bank v. Haight, 55 Ill. 191.

² Carver v. Louthain, 38 Ind. 530; Mathilde v. Levy, 24 La. An. 421; Sullivan v. Collins, 18 Iowa, 228.

³ Phillips v. Williams, 39 Geo. 597.

⁴ Austin v. Bingham, 31 Vt. 577.

⁵ Elwood v. Telegraph Co. 45 N. Y. 549; Blankman v. Vallejo, 15 Cal. 638.

⁶ Conrad v. Williams, 6 Hill. 444.

⁷ French v. Millard, 2 Ohio N. S. 44. To the same point, McClurkin v. Ewing, 42 Ill. 283.

§ 364. *Bad Reputation of a Witness.* — There was formerly a rule founded on the maxim, *Falsus in uno, falsus in omnibus*, by which if a witness was discredited, the jury had a right to reject his testimony altogether, and could be so instructed. This rule is sanctioned by no less an authority than Starkie. He says: "As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular, cannot be credited as to any, according to the legal maxim, *Falsus in uno, falsus in omnibus*."¹

This rule has been found unreliable, and while a jury may be properly instructed to scrutinize with great care the evidence of such a person, it is not right to instruct them to reject it wholly; for human experience also bears witness to the fact, that a person of infamous character, untrustworthy as regards his veracity, may often, from the very law of his nature, speak the truth on some occasions. The rule laid down by Starkie above was at one time followed in Ohio, but cases in which it was applied were overruled in *Mead v. McGraw*.² The court, after showing by various examples the fallaciousness of the rule, say: "Other examples might readily be given to show that the application of the rule as an *absolute rule of law* irrespective of circumstances, would be impracticable in its operation, and would often tend rather, to defeat than to promote the ascertainment of truth."

In *Mercer v. Wright*³ it is held that the maxim is to be applied by the jury according to their own judgment.

In some places the rule is accepted and applied with this qualification, — *where the witness wilfully and knowingly gives false testimony*.⁴

Thus, in Missouri it is held proper to instruct a jury, that if a witness has wilfully and knowingly sworn falsely to any

¹ Ev. 873.

² 19 Ohio N. S. 55, overruling *Stoffer v. State*, 15 Ibid. 47.

³ 3 Wis. 645. So, in *State v. Williams*, 2 Jones (N. C.), 257; *State v. Spencer*, 64 N. C. 316; *Parsons v. Huff*, 41 Me. 410; *Senter v. Carr*, 15 N. H. 351; *Meixsell v. Williamson*, 35 Ill. 529; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Brett v. Catlin*, 47 Barb. 404.

⁴ *Callanan v. Shaw*, 24 Iowa, 451; *People v. Strong*, 30 Cal. 151; *Chicago v. Smith*, 48 Ill. 107.

material matter in the case, then the jury are authorized to discredit the whole of his testimony.¹

The rule in England, according to the recent work of Taylor on Evidence, is, that if a witness be detected in telling a falsehood in one part of his testimony, the jury will be advised to place little reliance on the remainder of his narrative.²

§ 365. *Accomplices.* — The degree of credit to be given to an accomplice should be submitted to the jury with proper instructions. There is no rule of law that they may not convict upon such testimony.³ Thus, it is held in Vermont⁴ the jury are the final judges of the weight of testimony, whether from accomplices or others, and it is not error for the court to neglect or refuse to express an opinion as to what facts they should find or not find upon the proof. It is the better practice to advise the jury to convict no prisoner unless there is some proof other than the testimony of an accomplice tending to show the prisoner to have had guilty connection with the commission of the crime. But it is only a rule of practice.

While there is no absolute rule of law as to the degree of credit attached to the evidence of an accomplice, yet it is a rule always followed at the request of a party against whom this evidence is offered, to instruct the jury that the evidence of such a person is to be received with caution. Thus, in a case where the person with whom an adultery was alleged to have been committed was examined as a witness, and the court instructed that if the evidence showed him guilty, he was an accomplice, and as such his testimony must be received with more caution and would be entitled to less weight than that of others; it was held that this instruction was correct.⁵

§ 366. *Confessions.* — While it is the province of the court

¹ *Paulette v. Brown*, 40 Mo. 52.

² *Ev.* § 171.

³ *State v. Litchfield*, 58 Me. 267.

⁴ *State v. Potter*, 42 Vt. 495; *Dick v. State*, 30 Miss. 593.

⁵ *Lewis v. Lewis*, 9 Ind. 105. See, on this point, *Rex v. Hastings*, 7 C. & P. 152; *People v. Costello*, 1 Denio, 83; *Haskins v. People*, 16 N. Y. 344; *Keithler v. State*, 10 Sm. & M. 192; *Allen v. State*, 10 Ohio N. S. 287.

to admit in evidence confessions, it belongs to the jury to determine what effect shall be given to them, with, however, instructions from the court; for as in regard to the credibility of witnesses there are rules of law for the guidance of the jury, so in respect to confessions.

Thus, it is held a voluntary confession is entitled to but little weight, as it is but natural that one accused of crime should endeavor to palliate his guilt by excuses, and if a different statement should be afterwards made under oath, when circumstances have changed the condition of the party, it will be with the jury to say whether they will disbelieve him on account of such discrepancies.¹

It was held not error in the court, in a criminal case, to charge the jury to give such weight to the defendant's confession as they deem it entitled to, "judging from the circumstances under which it was given, and the motives which would naturally actuate the party in giving it," and that they might in their discretion believe a part and disbelieve another part of such confession.²

But an instruction to the jury, that "the confessions or declarations of a party in evidence before them is the weakest and most unsatisfactory kind of evidence, on account of the facility with which it may be fabricated, and the difficulty of disproving it when false," is erroneous in confounding the evidence of admissions with the admissions themselves, and in failing to observe the distinction between them.³

§ 367. In cases of conflicting evidence, the province of the jury is exclusive. It is their duty, if possible, so to reconcile the whole as to make all speak the truth.⁴ But where testimony is so equally balanced that no conclusion can be drawn from it, it is the duty of the jury to decide against the party who holds the affirmative of the issue.⁵

Where there is a conflict in the testimony of two witnesses which cannot be reconciled, regard must be had, in determin-

¹ Keithler v. State, *supra*.

² People v. Wyman, 15 Cal. 70, following 1 Greenl. on Ev. § 218.

³ Higgs v. Wilson, 3 Met. (Ky.) 337.

⁴ Durham v. Holean, 30 Geo. 619; Boykin v. Dohlonde, 37 Ala. 577; Bill v. People, 14 Ill. 432.

⁵ Watt v. Kirby, 15 Ill. 200; Ray v. Donnelly, 4 McLean, 504.

ing which one was mistaken, to the capacity of the witnesses, their respective opportunities of knowing the facts to which they depose, and the nature of the facts deposed to, as calculated to impress themselves with more or less force on the memory.¹

It is a rule that positive testimony of a witness should preponderate over the negative testimony of another witness equally credible.²

§ 368. The sufficiency and weight of evidence properly lies in the province of the jury, except in those cases where the law has fixed a standard of sufficiency, as, for example, in cases of treason and perjury.³

We must be careful, on this point, to discriminate between the functions of the court and jury. We sometimes observe a court declaring, after a party has brought forward his evidence, that it is *insufficient* to establish his cause of action. Is not this passing upon the *sufficiency* of the evidence? And does it not therefore infringe upon the province of the jury? So some would maintain, and for that reason they would deny power to the court to nonsuit a party,⁴ or to direct a verdict; but this view is not held generally, for the right of the court to direct a nonsuit or a verdict has been for a long time too well acknowledged to be seriously questioned; it is founded both on principle and authority.

We apprehend that the distinction is thus clearly stated: it is within the power of the court to declare what facts must be proved to maintain a right of action; in other words, to determine the *legal* sufficiency of evidence. It falls properly within the province of the jury to find whether those facts have been proved or not, and when evidence is produced tending to prove these facts, its *sufficiency* to find such facts is exclusively for the jury.

So, it is held that the only legal test of the sufficiency of evidence to establish a given fact is its sufficiency to satisfy the

¹ Hitt v. Rush, 22 Ala. 563.

² Pool v. Devers, 30 Ala. 672; Frantz v. Lenhart, 56 Penn. St. 365; Brady v. Little, 21 Geo. 132.

³ See § 321.

⁴ See as to nonsuit, chap. 3.

mind and conscience of the jury;¹ that there is no standard for the sufficiency of evidence to induce belief; and the various degrees of more or less must be left to the determination of the jury.² The court has no right to exclude evidence for insufficiency.³

So, where the evidence of a completed sale is weak and unsatisfactory, but has a *tendency* to sustain it, the court cannot weigh the testimony and determine its sufficiency as a matter of law; this is for the jury.⁴

Possession of stolen goods recently after a larceny, is a circumstance of guilt, the weight of which is for the determination of the jury under all the circumstances.⁵

The impression of a witness who professes to have any recollection at all is some evidence, the weight of which is a matter for the jury, and will of course depend very much upon circumstances.⁶

§ 369. *Personal Knowledge of Jurors.* — In former times it was the rule for the jury to decide according to their individual knowledge. Now they can only decide upon the evidence produced before them; their oath expressly binds them to this; and a consideration of knowledge otherwise obtained will vitiate their proceedings in nearly all cases. They are triers of the facts, not from personal knowledge, but upon the testimony of others who have personal knowledge of the facts.⁷

But it would not be correct to state that a jury must exclude their personal knowledge entirely when they make up their verdict. The rule is, that they should not trust to their personal knowledge *as an item in the evidence* upon which they find facts. It is understood that a juror's knowledge of men and things, his general observation and experience, are important elements to aid him in the discharge of his duties.

¹ Burrell v. State, 18 Tex. 713; Reynolds v. Cox, 11 Ind. 262.

² Means v. Means, 5 Strobb. 167.

³ Winston v. Wales, 13 Mo. 569; Franks v. State, 1 Iowa, 541.

⁴ Sawyer v. Nicholls, 40 Me. 216; Greene v. R. R. Co. 38 Iowa, 100.

⁵ Fackler v. Chapman, 20 Mo. 249. But the court can instruct the jury that it is a circumstance of guilt. Jones v. People, 6 Park. Cr. 126.

⁶ McRae v. Morrison, 13 Ired. 46.

⁷ Clark v. Robinson, 5 B. Mon. 563.

It is, however, erroneous for a juror to take into consideration his own personal knowledge of the character of a witness, and urge it upon his fellow jurors. The court in Massachusetts say: "It has very naturally come to be well settled that a juror cannot give a verdict founded on facts in his own private knowledge. If the juror knows any particular fact material to the proper decision of the case, he ought to be sworn as a witness in open court, and be publicly examined, so that his evidence, like that of other witnesses, may first be scrutinized as to its competency and bearing upon the issue, and for the further reason that the court and the parties may know upon what evidence the verdict was rendered."¹

§ 370. Permitting the jury to view premises about which there is a controversy, has been a well recognized and familiar practice for centuries. Provision for this was made by statute 4 Anne, c. 16, § 8, which provided, "that where it shall appear to the court . . . that it will be proper and necessary that the jurors who are to try the issues in any such actions, should have the view of the messuages, lands, or place in question, *in order to their better understanding the evidence that will be given upon the trials of such issues*, in every such case the respective courts . . . may order special writs to issue by which the sheriff or some other officer shall be directed to have six out of the first twelve of the jurors named in such writs, or some greater number of them at the place in question, some convenient time before the trial, who then and there shall have the matters in question shown to them by two persons in the said writs named."

The practice is now regulated in each State by statute. In a late case in California, decided in 1875, this question was brought under the consideration of the court.² The action was in reference to certain lands claimed under a patent. Before any testimony was offered, the court sent the jury to examine the land, and they were instructed on the trial in reference to such examination, that "it was their duty to give such examination made by them its due and proper weight in

¹ Schmidt v. Ins. Co. 1 Gray, 535, quoting 1 Stark. Ev. 449, and cases.

² Wright v. Carpenter, 49 Cal. 608. To the same point, Close v. Samm, 27 Iowa, 503.

assisting them to determine the character of the lands" at a certain time. The court held these instructions erroneous, in so far as they authorized the jury to take into consideration the result of their own examination of the land, in determining its character as swamp and overflowed, or otherwise; for the court say: "In authorizing the court to send the jury to view the premises in litigation, it was not the purpose of the statute to convert the jurors into silent witnesses, acting on their own inspection of the land, but only to enable them the more clearly to understand and apply the evidence."¹

✓ § 371. In the assessment of damages the jury may, and do properly, proceed on their personal knowledge. So, it is held, in estimating the damages sustained by an individual by reason of his land being taken for public use, the jury may rightfully be influenced by their general knowledge and experience of like subjects, as well as by the testimony and opinion of witnesses.²

✓ While the jury have this power, it must be exercised with judgment and discretion. Too often have excessive damages been awarded by a jury proceeding on their own predilections or passions; and for this very reason many have condemned the system because of the glaring abuses attending their action in the assessment of damages, especially in actions against corporations. But excessive verdicts obtained from feelings of passion or prejudice can be examined in the higher courts, and on some occasions courts have used strong language in

¹ This was evidently the intent of the statute of Anne, for it provided that it was for the purpose to a "better understanding the evidence that will be given upon the trial of the issue." It was not the intent of that statute to give any additional effect *as evidence* to the view obtained by the jury. The California Code, however, makes use of a phrase not quite consistent with the statute; for it says, Code of Procd. § 1954, "Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury."

² *Patterson v. Boston*, 20 Pick. 159; *Parks v. Boston*, 15 Ibid. 209. In an action of trespass, the question of damages is a question particularly for the jury. *Drake v. Palmer*, 4 Cal. 11. In a foreclosure action, where there is a counterclaim for an alleged breach of a covenant of seisin, the question as to amount of damages for such breach if proved, is a proper one for a jury. *Hall v. Gale*, 20 Wis. 292.

condemning them. Thus, in a case in Illinois,¹ in setting aside a verdict, it is said: "It has become a matter of public notoriety, and is evidenced by many of the records brought to this court, that juries may generally assess an amount of damages against railway corporations which, in similar cases between individuals, would be considered unjust in the extreme. It is lamentable that the popular prejudice against these corporations should be so powerful as to taint the administration of justice, but we cannot close our eyes to the fact. When this becomes apparent the courts must interfere. However natural this prejudice, or however well deserved, it cannot be permitted to find expression in unjust verdicts."

In another case reported in the same volume,² the court uses still stronger language, saying: "This verdict is unprecedented in the annals of judicial proceedings. It bears upon its face the stamp of prejudice, partiality, and oppression, and ought not to remain on our records. Such verdicts as this outrage that sense of justice which has a lodgement in every well regulated mind, and if sustained by this court, could not but tend to increase that tide of opposition to the jury system which is now rising and advancing in more than one State of this Union. If sustained, juries will be regarded as instruments of oppression rather than a bulwark of our liberties."

§ 372. The tendency to limit this power is very evident in the many decisions of late, giving rules as to the measure of damages. It is true, exemplary damages are within the province of the jury as to *amount*, but the courts are every day more clearly defining what should be considered in the estimation of these damages, so as to preclude any arbitrary decision by the jury in regard to their amount. This will obviate those well-founded complaints against the jury system; and will confine the jury more closely to its legitimate province as a tribunal to ascertain facts.

¹ Illinois Central R. R. Co. v. Welch, 52 Ill. 183. This case is noticed in the Journal of Jurisprudence, vol. 16, p. 90, as a case where a jury were improperly influenced by prejudice.

² Walker v. Martin, 52 Ill. 347. In this case the jury gave a verdict for \$25,000 against a rich defendant, for a malicious arrest of a poor man, where the injury was a brief detention and an additional stain on a not unblemished reputation.

The grounds and the extent of the interference by the court with the duty of the jury in this respect, are clearly and accurately stated in a late Mississippi case, where it is held that it is the exclusive province of the jury to determine in cases of wrongful attachment the *quantum* of the defendant's damages. And this court will not substitute its own judgment for that of the jury. But in cases where the damages are out of proportion to the wrong done as to produce a conviction that they were not estimated upon the basis of compensation, but upon wrong premises, and were the result of haste, inconsiderateness, or intemperance, and that the court, by its agency, contributed to the error, this court will order a new trial.¹

§ 373. Right to decide the Law: how far claimed. — In many places it has been claimed for the jury that they may rightfully disregard the instructions of the court in matters of law, and if they think the instructions wrong, that they can acquit or convict in defiance of such instructions. In short, that they are the ultimate, rightful, and paramount judges of the law as well as the facts in criminal cases. If a person wished to establish this position on *authority*, it would not be difficult to marshal a multitude of authorities, of old and recent date, of very respectable weight and learning on his side.

The controversy is an old one; it has been waged for centuries; it often produced bitter conflicts; and not seldom has it directed legislation. It cannot even now be considered as authoritatively or generally settled; though in this country there is less occasion for doubt in this matter, since the power of the jury is in many places defined by statute.

The great champion of this doctrine was Erskine, who made his most brilliant success in his arguments in State Trials, wherein he contended for the right of the jury to pass upon the law as well as the fact. It is true, this argument is correct, so far as it is based upon the earliest exercise of the functions of the jury. They did, unquestionably, at first find the law as well as the fact.

¹ *Myers v. Farrell*, 47 Miss. 281. In an action for breach of promise, the jury is the appropriate tribunal for ascertaining the amount of damages, and in such a case a new trial will not be granted unless they are so great as to make it a case of indubitable wrong. *Waters v. Bristol*, 26 Conn. 405.

§ 374. The power of attaint controlled a wanton exercise of this power.¹ Lord Coke says: "Although the jury, if they will take upon them the knowledge of the law, may give a general verdict, yet it is dangerous for them to do so; for if they mistake the law, they run into danger of an attaint; therefore, to find the special matter is the safest way where the case is doubtful."²

When the power of attaint became obsolete, and new trials were introduced, it became an established practice for the jury to be guided by the court in the application of the law, otherwise the court would set aside the verdict rendered against the instructions of the court.³ Thus the practice became formulated into the well-known and old maxim, *Ad questionem facti, non respondent judices, ad questionem legis non respondent juratores*.

The right of the court to declare the law to the jury, who are to be bound by it, has many times been emphatically declared in English legal history. So far back as 1649, on the trial of Colonel Lilburne, the court resented with much warmth the insinuation that the jury could decide the law. One of them (Jermin), in language more emphatic than elegant, pronounced the doctrine a "damnable blasphemous heresy," and the jury were instructed by the chief justice that they were not the judges of the law; that they "ought to take notice of it that the judges, who are twelve in number, and who are sworn, have ever been the judges of the law, from the first time we can read or hear that the law was truly expressed in England, and the jury only judges of matter of fact."⁴

§ 375. The power and the right of deciding the law have been confounded in the discussion of this subject; and, often, if a distinction were made as to the *power* and the *right* of the

¹ For a full description of the nature and object of attaint, see chap. 1, § 32.

² Co. Litt. 228 b.

³ Except in cases of acquittal; even then at one time the Star Chamber presumed upon this right, as we have shown in the first chapter of this work. The effect of a verdict of acquittal will be more fully referred to in the next chapter.

⁴ 2 Hard. St. Tr. 69, 82. The authorities in England are most elaborately examined by Mr. Hargrave in a note to the third volume of his edition of Coke upon Littleton, wherein he proves the fallacy of the doctrine that the jury have a right to decide the law.

jury, the authorities would not be so discordant. It cannot be denied that the jury in criminal cases have the *power*, which is often too freely exercised, to decide upon the law in criminal cases; and if improperly exercised, will, in some instances, be irremediable. But if the question be as to their *right* to decide the law, it is entirely a different matter. It may be safely asserted that in a large majority of our States this right is denied. Otherwise there will be very little meaning in appellate courts, and new trials, which proceed upon the assumption that a mistake of law has been made either by the court or the jury.¹

§ 376. The preponderance of judicial authority in this country is in favor of the doctrine that the jury should take the law from the court and apply it to the evidence under its direction. At the time of the foundation of the English colonies in this country there was a very strong feeling against arbitrary power; the colonists had, no doubt, painful recollections of the abuses of judicial power in the mother country; it was therefore natural that they should seek to enlarge the power of the jury and diminish that of the judge. Hence, the doctrine that the jury could take the law into their own hands was a popular one before and at the time of the Revolution. John Adams strongly advocated it;² even the judges of our Supreme Court, after the Revolution, favored it.³

¹ A very obvious effect of the jury system is that of bringing the public and moral sentiment of a community to bear upon the administration of law, modifying its stringent rules, and adapting them more justly to certain cases. This is particularly observed when a law is sought to be enforced which is not in harmony with the public or moral feeling of the class from whom the jury are selected. For instance, the law has a severe penalty for killing the seducer of a wife, or child; but with all the instructions of the court as to the character of the crime and its legal consequences, the jury will never find the accused guilty, so as to bring upon him the full penalty. So the law is clear as to the penalty attached to fighting a duel; but would it be expected that a jury would find one guilty where the code of honor is in estimation? This is admirably pointed out by a writer in the *International Review*, January, 1876, in an article entitled: "The Psychology of Homicide," in which the writer, a German jurist, alludes to the effect of the jury system as applied in criminal cases in France and Germany. He shows how hard it is to obtain a conviction in certain cases where the act is not held atrocious or criminal by the public sentiment. This was very lamentably exhibited in the agrarian outrages committed in Ireland, when it was almost impossible to find a jury to convict.

² *Life and Works*, p. 252.

³ In *Georgia v. Brailsford*, 3 Dall. 4, the Supreme Court instructed the jury

In *Williams v. State*¹ the court remark: "In many of the colonies, immediately preceding the Revolution, the arbitrary temper and unauthorized acts of the judges holding office directly from the crown, made the independence of the jury in law as well as fact a matter of great popular importance." But the doctrine was in due time discarded, the courts one after another holding it was the duty of the jury to be guided as to the law by the court. It is well this view was established, for under the former doctrine there could be no stability or uniformity in the law.

§ 377. Views in Regard to in New England States.— It might be expected that the former doctrine would prevail in New England, if anywhere; but in New Hampshire, in *Pierce v. State*,² the doctrine was strongly condemned by the court "as inconsistent with the spirit of the Constitution."

So in Massachusetts,³ Rhode Island,⁴ Maine;⁵ in Vermont,⁶ a majority of the court held that in criminal cases the jury are judges of the law as well as the facts, but the doctrine was resisted in a very able dissenting opinion by Bennett, J., and in a subsequent case⁷ the presiding judge declared that to him such doctrine was "most absurd and nonsensical." In Connecticut the form of the oath administered in criminal cases would seem to suggest the doctrine that the jury are the judges of the law; but the practice in that State has been to give instructions to the jury on the law, as in other States where the powers of the jury are limited.⁸ It was held there that the court, even on the agreement of parties, cannot try a

that they had a right "to determine the law as well as the fact in controversy." The federal courts in subsequent cases discarded this doctrine. See *U. S. v. Shive*, 1 Bald. 512; *U. S. v. Battiste*, 2 Sum. 243. In this last case, Story, J., held very decided views against the doctrine.

¹ 32 Mass. 396.

² 13 N. H. 536.

³ *Commonwealth v. Porter*, 10 Met. 263; *Commonwealth v. Lawrence*, 9 Gray, 135.

⁴ *Dorr's Trial*, 121.

⁵ *State v. Wright*, 53 Me. 328, where there is a full and exhaustive examination of the subject. *State v. Snow*, 18 Me. 346.

⁶ *State v. Crouteau*, 23 Vt. 14.

⁷ *State v. McDonnell*, 32 Vt. 523.

⁸ *Hayden v. Nott*, 9 Conn. 370; *Dulles v. DeForest*, 19 Ibid. 201.

criminal case without a jury.¹ We might claim, therefore, as a general rule, that in the New England States the jury are not the judges of the law as well as the facts.

§ 378. In New York there have been some decisions holding the view that the jury were the judges of the law; but in the case of *Duffy v. People*,² the New York Court of Appeals unanimously held that "the jury in criminal cases are bound by the instructions of the court as to the law, to the same extent as in civil cases." In this case the court gave the matter a thorough examination, and the authorities are fully reviewed. In *Carpenter v. People*³ it is said: "The idea which has become somewhat current in some places, that in criminal cases the jury are the judges of the law as well as the facts, is erroneous, not being founded upon principle or supported by authority."⁴

As an example of varying judicial opinion on this question in that State, it is worth while to observe that in the first volume of Parker's Criminal Reports there are decisions holding opposite views. Thus, in one case it is held that in criminal as well as in civil cases, except in a criminal prosecution for libel, it is the duty of the court to decide the questions of law, and of the jury to decide the questions of fact.⁵

Again, in another case it is held that in criminal cases the jury are judges both of law and facts. They have a right to disregard the opinion of the court in a criminal case, even upon a question of law, if they are fully satisfied that such opinion is wrong.⁶

§ 379. In Pennsylvania the language of the Constitution implies that the jury can determine the law and the facts; for in making provision in reference to libel it says: "In all

¹ *State v. Maine*, 27 Conn. 641.

² 26 N. Y. 588.

³ 8 Barb. 610.

⁴ Judge Thompson, while presiding in the United States Circuit Court in New York, was requested to charge the jury that they were judges both of the law and the fact. He made the remarkable curt reply: "I shan't; they ain't." Wharton C. L. § 3100.

⁵ *People v. Finnegan*, 1 Park. Cr. 147. See *Safford v. People*, *Ibid.* 474.

⁶ *People v. Videto*, 1 Park. Cr. 603.

indictments for libel the jury shall have a right to determine the law and the facts, under the direction of the court, *as in other cases.*" Wharton, referring to the practice in this State says: ¹ "In Pennsylvania, though there has been no reported decision on the express point from the Supreme Court in banc, yet it has not been usual in that State to leave to the jury the law to decide. A very strong leaning to the contrary is shown by Gibson, C. J., in closing a charge in a capital case: 'If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it.'"²

Not varying much from this is the language of Sergeant, J., in a charge in a case of misdemeanor: "The point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the court. If you believe the evidence in the whole case, you must find the defendant guilty."³

§ 380. In the Western States a majority give enlarged powers to the jury in criminal cases. In two cases in Illinois it is expressly laid down that the jury are not bound to follow the law as given them in criminal cases.⁴ But in the last case Bennett, J., condemned the doctrine in an able dissenting opinion. Indiana has fluctuated between the two views; but a later case holds the doctrine as in Illinois.⁵ In Arkansas the jury are sworn to decide the law;⁶ but in Pleasant v. State⁷ the court disapproved the doctrine that the jury were judges of the law. In Missouri it is error to instruct the jury that they are judges of the law and evidence.⁸

In Kansas the jury have the power in an indictment for an offence which may consist of several degrees, to find the accused guilty of a lesser degree than that charged in the indictment, but they are required to specify in their verdict of what

¹ Cr. Law, § 3106.

² Commonwealth v. Harman, 4 Barr, 269.

³ Commonwealth v. Vansyckle, Brightly, 73.

⁴ Schneir v. People, 23 Ill. 17; Fisher v. People, Ibid. 283.

⁵ Williams v. State, 10 Ind. 503.

⁶ Patterson v. State, 2 Eng. 59.

⁷ 13 Ark. 360.

⁸ Hardy v. State, 7 Mo. 607.

degree they find the prisoner guilty, and a general verdict of guilty is not sufficient.¹

In Tennessee it is held that the jury are not bound by the law as given by the court.² But of this doctrine the court in Kentucky say: "Juries have the power, but not the right, to disregard the law as expounded to them by the court, and render a verdict of not guilty, in a case where the law if correctly administered would result in a conviction; and their decision in such a case will be final, because a new trial cannot be awarded by the court. But such an improper exercise of power on their part does not tend to prove that they are not bound to consider the instructions of the court as containing the law of the case."³

In California the same doctrine is held.⁴

§ 381. In the Southern States, as a general rule, the doctrine of the independence of the jury is not favored. In Alabama it is held that the jury in a criminal case are not the constituted judges of the law, and consequently have not the legal right to disregard the instructions of the court; and a charge which assumes the contrary principle is properly refused.⁵

In Mississippi, Texas, Virginia, North Carolina, the same views are held.⁶

In Maryland the clause of the Constitution, that "in the trial of all criminal causes the juries shall be the judges of the law as well as of the fact," was held to be merely *declaratory*, and did not alter the previous powers of the court and jury in criminal cases. In this case it was held that it was proper to

¹ State v. Huber, 8 Kan. 447.

² Nelson v. State, 2 Swan, 482. See McGowan v. State, 9 Yerg. 184.

³ Commonwealth v. Van Tuyle, 1 Met. 1.

⁴ People v. Stewart, 7 Cal. 140; People v. Ivey, 49 Ibid. 56. In § 1125 of the Penal Code, it is provided that on the trial of an indictment for libel the jury have the right to determine the law and the fact; thus making this an exception. But in § 1118, where it is provided that "if at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. *But the jury are not bound by the advice.*" This is misleading. Why give the court a right to declare that the evidence is insufficient, if the jury are not to be bound by its advice?

⁵ Battle v. State, 18 Ala. 119; Pierson v. State, 12 Ala. 153.

⁶ Williams v. State, 32 Miss. 396; Nels v. State, 2 Tex. 280; Howel v. Commonwealth, 5 Gratt. 664; State v. Pearce, 2 Jones (N. C.), 251.

prevent counsel arguing as to the constitutionality of a law to the jury.¹

In Louisiana it is held that "it, doubtless, would be a safe rule for the jury to take the law from the judge as their guide, but they are not bound to do so;"² and if the court refuses to charge the jury that they are judges of the law and fact, their verdict in case of conviction will be set aside.³

In Georgia it is held the jury are independent in criminal cases, and are not bound by the instructions of the court.⁴ The rule is thus stated in *McGuffie v. State*:⁵ "The jury have a legal right to acquit the prisoner, although the judge may charge them that if certain facts be proven he is guilty according to law, though they may find those facts to be proven. But the judge is their safe and reliable adviser.

§ 382. In Indictments for Libel. — The struggle between those who favored giving enlarged powers to the jury and those who would restrict it to a mere finding of facts, was particularly persistent and determined in reference to indictments for libel. In the last quarter of the eighteenth century it agitated the courts and the people of England; it produced virulent debate in and out of Parliament; and it was at last made a question of party feeling and prejudice. Besides the legal questions involved, the struggle was important because it involved the liberty of the press; it was indeed for this very reason the legal question became so important and conspicuous.

The question was prominently brought forward in 1784, when the Dean of St. Asaph was indicted for libel. Lord Erskine defended him, and insisted that the jury had a right to pass upon the whole issue, including the law as well as the fact. Being overruled by Mr. Justice Buller, he moved for a new trial for misdirection; and in support of his motion is said to have made one of the most eloquent arguments ever listened to in Westminster Hall. But he did not succeed;

¹ *Franklin v. State*, 12 Md. 236.

² *State v. Jurche*, 17 La. An. 72.

³ *State v. Salika*, 18 Ibid. 35.

⁴ *McPherson v. State*, 22 Geo. 478.

⁵ 17 Ibid. 497.

the judges decided unanimously against him. Lord Mansfield, who delivered the judgment of the court, held that it was the right of the court to direct the jury in matters of law, and that they were bound to follow the direction. He stated that the jury do not know, and are not presumed to know the law; that they do not understand the language in which it is expressed, and have no rule to go by but their passions and feelings. That the doctrine that the jury were to judge of the law was contrary to judicial practice, contrary to the fundamental principles constituting trials by jury, contrary to reason and fitness, and he was glad that he was not bound to subscribe to such an absurdity.¹

§ 383. *Fox's Libel Act.* — At last the question was taken up by Parliament, when an act was introduced and passed in 1792, which is known as Fox's Libel Act.² It is entitled "An act to remove doubts respecting the functions of juries in cases of libel."

It declares and enacts that the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue upon the indictment and information, and shall not be required or directed by the court or judge before whom it shall be tried to find the defendant guilty merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information. Provided that on every such trial the court or judge before whom it shall be tried shall, according to their discretion, give their opinion and direction to the jury on the matter in issue, in like manner as in other criminal cases. Provided, also, that nothing therein contained shall prevent the jury from finding a special verdict, as in other criminal cases. Provided, also, that in case the jury shall find the defendant guilty, he may move an arrest of judgment on such ground and in such manner as by law he might have done before the passing of the act.

§ 384. *Effect of the Act.* — Notwithstanding that the act was intended to remove doubts respecting the functions of the

¹ See 3 T. R. 428; 21 How. St. Tr. 847.

² 32 Geo. III. c. 60.

jury in libel cases, its meaning and effect are not generally understood; respectable authorities differing in this respect. Thus, Lord John Russell, referring to the act, says: "By this bill juries were constituted judges of the law as well as of the fact; that is to say, they were entitled to decide not only whether the writing in question had been published or no, but also whether it were libellous."¹ In regard to which Forsyth says: "But this is a mistake. No such power is conferred upon juries by the statute in question, and they are no more entitled since its passing to take the law into their own hands in cases of libel, than in those of murder or any other alleged crime."²

Now these are extreme views on each side. It is manifest that by the act the powers of the jury in cases of libel were enlarged; the purport of the act had this in view. • What additional right did it confer? Evidently this: that the jury cannot be directed, as had been done previously to the act, to bring in a *special verdict*, merely finding the fact of publication, and thus leaving it to the court to find the guilt of the accused on the fact so found. This power was denied the court by the act; the jury in a general verdict *could* find the accused guilty or not. The court may, still, as in other cases, explain the law to the jury, and properly they should be guided by the law so given them as to what constitutes a libellous publication. In *Rex v. Burdett*,³ Mr. Justice Best said: "Libel is a question of law, and the judge is the judge of the law in libel as in all other cases; the jury have the power of acting agreeably to his statement or not. All that the statute does is to prevent the question from being left to the jury in the manner in which it was left before that time."

Lord Abinger⁴ thus speaks of the act: "Before that statute a practice had arisen of considering that the question, libel or no libel, was always for the court, independent of the intention and meaning of the party publishing. That statute corrected the error; and now, if the intention does not appear on the body of the libel a variety of circumstances are to be left to

¹ Essay on Eng. Govt. p. 391.

² Trial by Jury, p. 279.

³ 4 Barn. & Ald. 131.

⁴ *Reeves v. Templar*, 2 Jur. 137.

the jury from whence to infer it; but it was never intended to take from the court the power of deciding whether certain words are *per se* libellous or not."

§ 385. *Views in the United States.* — The feeling in this country in regard to the powers of the jury in actions for libel is remarkably shown in the special provision made for it in our state Constitutions. It is regarded as so important as to be included as a distinct provision among other fundamental rights. But there is no greater power allowed in this respect than in England under Fox's Act. The court may still construe a writing, and instruct the jury that it is libellous *per se*, but the jury cannot for this reason be directed to find a verdict of guilty; it must be left with them to determine the intent, the truth, and other matters in connection therewith to explain the publication.¹

The practice in this country is against permitting the jury to find a special verdict in cases of indictment for libel, though it is expressly so provided in the English statute. Thus, on an indictment for libel, the jury returned a special verdict, that the defendant did publish, &c., and that he did the same without malice, but with no justifiable motive. It was held that this could not be considered as a verdict either of guilty or not guilty, and that a new trial must be ordered.²

The cases where libel is prosecuted criminally as a public offence, on behalf of the people, are getting to be very rare in this country. Actions for libel are most generally prosecuted by individuals for damages, and therefore the law, as applied in criminal cases, will not be applicable in a civil suit. The jury then are bound by the instructions of the court as to the law.³

II. IN RESPECT TO THEIR GENERAL DEMEANOR.

§ 386. *What the Law requires in Jurors.* — In a previous part of this work it has been shown how carefully jurors are examined regarding their qualifications before they are placed

¹ *State v. Lehre*, 2 Brev. (S. C.) 446; *Hunt v. Bennett*, 19 N. Y. 173; *Forshee v. Abrams*, 2 Clarke, 571.

² *Commonwealth v. Guild*, Thach. Cr. Cas. 329; *Webber v. State*, 10 Mo. 4.

³ *Levi v. Milne*, 4 Bing. 195; *Dollaway v. Turrell*, 26 Wend. 399.

in the jury box; but this searching and general examination often fails to detect unworthy members, who will often on the trial exhibit a disregard for their high duties. The conduct of the jury after they are impanelled is a matter of very great concern. The law, before their selection, insists on impartiality between the parties; hence, any exhibition of favor toward either of the parties, by act or expression, will be fatal to their proceedings. It requires attention to their duties, a careful hearing of the evidence; hence, instances of inattention, as a juror falling asleep, will be sufficient to draw upon them a reprimand, and in some cases set aside their verdict. It is further required that they be discreet and sober men, and therefore, where a juror drinks intoxicating liquors during the performance of his duties, it is presumed an act of impropriety, and will often vitiate their whole proceedings. They are sworn to decide on the evidence, therefore, if other information be sought by them, or given, their proceedings will be invalid.

§ 387. On the Trial. — Juror sleeping, — In Tennessee, after a verdict of guilty of passing counterfeit money, it appeared that during the investigation of the cause in court the manner of one of the jurors showed that he was in a state of dull and stupid abstraction; that when the jury retired to deliberate, the aforesaid juror became much indisposed, being threatened with spasm, and on the verge of an attack of *delirium tremens*. The family physician of the juror testified that the juror could not have been during the trial in a condition to inform himself intelligently of the facts and circumstances of the case. Some of the jury testified that he manifested more intelligence than they had expected, in discussing with them the testimony; but whether his knowledge in this respect was the result of attention in court, or was picked up in the jury room, they did not know; this was held a proper ground for a new trial.¹ Here the condition of the juror was unknown to the court, or to counsel on both sides, until after the verdict. But where a juror slept part of the time during the trial, which was known to the prisoner, and yet he called the attention of no one to the fact, and it did not appear that the

¹ Hogshead v. State, 6 Humph. 59.

court or any one else observed or knew it, it was held that the prisoner had waived any objection he might have made to the verdict on this ground.¹

In a recent case in Georgia, one of the grounds on which a new trial was asked was, that one of the jurors was at times asleep during the trial, during the delivery of a part of the testimony, during the argument of counsel, and during the charge of the court. It was decided that a new trial ought not to be granted on such a ground, unless it affirmatively appeared that the prisoner and his counsel did not know the jurymen were asleep before the jury retired to find a verdict.²

The principle deducible from these cases is that, where a juror is asleep during a part of the trial, it will be a ground for new trial when the fact was not known to the court, or to either of the parties.

§ 388. Expressions in Regard to the Parties or Issue. —

There is no more frequent cause of complaint during the trial, and none which is more seriously regarded, than expressions of opinions by jurors in regard to the parties or the merits of the cause. It will not, however, in every case, be a sufficient ground for setting aside the verdict, unless the expression be such as to unmistakably indicate a previous opinion irrespective of that derived from the evidence. Thus, where a juror swore that he believed himself to be unbiased, but admitted that he told the jury that the defendant (in a murder case) was a bad man and had beat a man nearly to death, and then narrated the beating of which the defendant had been acquitted, and admitted that the jury were influenced by his statements; thereupon the court set aside a verdict of guilty and ordered a new trial.³ Where the improper conduct com-

¹ *Baxter v. People*, 3 Gilman, 368.

² *Cogswell v. State*, 49 Geo. 104. See, to the same point, *Peham v. Page*, 1 Eng. 535. During the progress of a trial for murder, two of the jurors, over the objection of the defendant, took in writing notes of the evidence, and persisted therein although directed by the court not to do so. This was held such misconduct as entitled the defendant to a new trial; because it was well calculated to divert the attention of the jurors, while they were busy pencil or pen in hand, from the evidence, as it would naturally be progressing while such notes were being made. *Check v. State*, 35 Ind. 492.

³ *Martin v. State*, 25 Geo. 494. In the prosecution of a felony, where there is

plained of was that one of the jurors, during a recess, expressed the opinion that the defendant was guilty from what the evidence had shown, and this was one of the grounds on which a new trial was asked, the court held: "That the juror in declaring his opinion was guilty of gross misconduct cannot be denied, but it is not such misconduct as can induce the court to overhaul his ultimate decision. A different case would have been presented if it had been shown this open declaration of opinion had influenced him to turn a deaf ear to the evidence subsequently given on the part of the defendant."¹

Where it appeared that two of the jurors while charged with the consideration of the case discussed its merits and commented upon the evidence in presence of persons at table, and misstated it by saying that the defendant, sworn as a witness, had contradicted himself, the verdict was set aside.²

§ 389. The expression must be such as to indicate a previous conviction of mind, or a decided prejudice. But casual remarks thrown out in reference to the case, either on a supposition or on the evidence produced, will not in general amount to misconduct sufficient to set aside a verdict.³ The remark of a juror during a recess of the trial, that there was no use in taking up time in trying to humbug the jury, and that the lawyer who made the shortest speech would win the case, was not such misconduct as to vitiate the verdict.⁴ So the mere fact that a juror pending a trial, and whilst the jury were separated for dinner, expressed the opinion that the jury would find for plaintiff, without other improper conduct, is not

proof that the jury conversed with others, not in the presence of the sheriff, it not appearing whether they conversed on the subject of the trial or not, the burden is upon the Commonwealth to show that no undue or improper influences were used; and if such proof is not made the verdict will be set aside. *Commonwealth v. Shields*, 2 Bush (Ky.), 81.

¹ *Commonwealth v. Sallager*, 3 Penn. L. Jour. 518.

² *Blalock v. Phillips*, 38 Geo. 216. See *Wiggin v. Plumer*, 31 N. H. 251; *Riley v. State*, 6 Humph. 275. Where a juror talked about the case and gave his opinion, judgment was arrested. *Bennett v. Howard*, 3 Day, 223; *Pettibone v. Phelps*, 13 Conn. 445. It is a ground for a new trial, if a juror before being sworn expresses a determination to give the verdict one way. *Ramadge v. Ryan*, 9 Bing. 333; *Allum v. Boulton*, 18 Jur. 406.

³ *Epps v. State*, 19 Geo. 752; *Collier v. State*, 20 Ark. 36.

⁴ *Taylor v. California Stage Co.* 6 Cal. 228.

sufficient ground for a new trial.¹ So, during the trial of a cause, a jurymen said to a witness for the plaintiff that "they would throw the costs of the action upon the defendant, of course," to which the witness replied that "they would, of course." The jury found for the plaintiff. On a motion for a new trial it was held, that although such conduct on the part of a juror was a violation of his public duty, yet as it did not show any bias or prejudice for or against either of the parties, it was not a sufficient cause for granting a new trial. But if the plaintiff had been privy to such conversation, the verdict should be set aside.²

§ 390. Conversation in regard to the case is another and not an unfrequent instance of the misconduct of jurors. While they may not themselves express or suggest their own opinions, yet the fact that others are permitted by them to speak with them, especially if these parties be interested, will be such misconduct as courts will take notice of as a ground for a new trial. Though it is not *per se* sufficient, except the circumstances be such as to show an attempt to tamper with them, and that a verdict was rendered in favor of the party who approached them.³

In an action for the unlawful taking of a heifer and other cattle, while the jury were making an inspection, a statement was made by one of the witnesses for the plaintiff, in the hearing of one or more of the jurors, to the effect that one or both of the horns of said roan heifer had been filed or scraped to disguise or conceal the point where it had been broken, and the verdict without evidence thereof seemed founded on such theory, the judgment was reversed.⁴ And where the plaintiff's son-in-law said to one of the jurors, during trial, that the cause was of great consequence to him, that he should have to pay the costs if the cause should go against the plain-

¹ Harrison v. Price, 22 Ind. 165.

² McIlvaine v. Wilkins, 12 N. H. 474; Foster v. Brooks, 6 Geo. 287.

³ Grinnell v. Phillips, 1 Mass. 530; People v. Boggs, 20 Cal. 432; Jackson v. Jackson, 32 Geo. 325; Nelms v. State, 21 Miss. 500; Perkins v. Knight, 2 N. H. 474; State v. Haschall, 6 Ibid. 352; Nesmith v. Ins. Co. 8 Abb. Pr. 141.

⁴ Erwin v. Bulla, 29 Ind. 95. Where the jurors go out of their room, and eat and drink, and converse with the bystanders, &c., their verdict will be set aside. Demund v. Gowen, 5 N. J. L. 687.

tiff, and that the defence of the action was a spiteful thing on the part of the defendants, a new trial was granted.¹ A new trial will not be granted on account of idle words spoken to a juror by a by stander, it not appearing that there was any fault on the part of the juror, or that of the party in whose favor the verdict was given.²

§ 391. Conversations with the officer in charge of the jury, in reference to the case, is decided misconduct in jurymen, and will in many cases vitiate their verdict. Thus, upon a motion to set aside a verdict on account of remarks which were made to the jury by the officer in charge, it is sufficient to show that there is reason to suspect that the remarks were made, and that they were likely or calculated to influence the verdict without proving that such influence was in fact exerted.³ So it is laid down that "officers having a jury in charge while they are deliberating on their verdict, should never speak to them, except to ask them whether they have agreed. Any conversation by the officer ought to subject him to severe punishment by the court; and any verdict returned after such conversation, whether it had any influence or not in producing the verdict, ought to be set aside the moment the fact comes to the knowledge of the court."⁴

§ 392. Obtaining information outside of the evidence is forbidden by the terms of a juror's oath; and where it appears that such information has had an influence the verdict will be set aside.⁵

So, where a juror asked one of the witnesses, during the time the verdict was under consideration, if he had made certain statements; this was regarded as sufficient to set aside the verdict.⁶

¹ Knight v. Freeport, 13 Mass. 218.

² Stewart v. Small, 5 Mo. 525. See Love v. Moody, 68 N. C. 200; Hamilton v. Pease, 38 Conn. 115. The misconduct of a juror in holding a conversation with an attorney respecting the law of the case, after the conclusion of arguments of counsel, was held sufficient ground for granting a new trial. Oleson v. Meader, 40 Iowa, 662.

³ Thomas v. Chapman, 45 Barb. 98.

⁴ Cole v. Swan, 4 Greene (Iowa), 32; Reins v. People, 30 Ill. 256.

⁵ 2 Hale P. C. 307.

⁶ Van Meter v. Kitzmiller, 5 W. Va. 380. So, where the jury sent for a witness

Where the foreman of the jury, during the trial of a cause, spent a Sunday at the defendant's house, on which occasion defendant conversed with him about the glass which was the subject-matter of the suit. While the cause was on trial the foreman gave to his associates the information he received from the defendant, and described to them the condition of the glass, which was not exhibited to them. The verdict, being for the defendant, was set aside.¹

§ 393. When this information comes from a fellow juror, it is regarded as improper conduct on the part of the juror so communicating it, and if it appears to have had an influence on their deliberation, the verdict will be set aside.² If a juror have any information bearing on the matter in issue it is his duty to be sworn and subjected to an examination as a witness.³

The statement by a juror in the jury room, that he knew a certain witness who testified for the party in whose favor the verdict was found, and that he was a responsible and truthful man, will not vitiate the verdict, when it is shown by a preponderance of evidence that the statement was not made until after the verdict was found.⁴ But where a jury, after they retired to deliberate on a cause, received and were influenced by the declarations of one of their fellows discrediting a material witness of the plaintiff, it was held to be a good cause to set aside the verdict.⁵

§ 394. Separation of Jury during the Trial. — In civil cases it is the general rule to permit the jury to separate during the trial when the court is not in session; but the practice in criminal cases is not so uniform. It will be found to be the usual practice to keep them in charge of an officer during the

examined at the trial, without the knowledge of the court or parties. *Luttrell v. R. R. Co.* 18 B. Mon. 291.

¹ *McIntire v. Hussey*, 57 Me. 493; *Deacon v. Shreve*, 2 Zab. 176; *Cottle v. Cottle*, 6 Me. 140.

² *Booby v. State*, 4 Yerg. 111; *Sam v. State*, 1 Swan, 61; *Hall v. Robinson*, 25 Iowa, 91.

³ *Donston v. State*, 6 Humph. 275.

⁴ *Wise v. Booley*, 32 Iowa, 34.

⁵ *Parinton v. Humphreys*, 6 Me. 379.

progress of the trial.¹ The question that arises in connection with a separation of the jury is, how far the unauthorized separation of the jury will avoid a verdict. There will be found two views as to the effect of such separation. First, that of itself it will not set aside a verdict. Secondly, that where it appears the jury left the charge of the officer and mingled with others, it will be conclusive evidence of misconduct sufficient to set aside the verdict.

The rule was formerly very strict as to the separation of the jury. Chitty thus speaks of the practice: "When this is the case the jury all retire together, to some adjoining tavern, where accommodations are prepared for them, and the bailiffs are sworn 'well and truly to keep the jury, and neither to speak to them themselves, nor suffer any other person to speak to them, touching any matter relative to this trial.' And if the jury separate and one of them converse respecting the verdict with a stranger, the verdict will be bad, and a *venire de novo* awarded."²

Yet in the oldest case reported,—the Earl of Kent's case in the year book of the reign of Henry VII.,—where the jury dispersed by reason of a thunder-storm, and a conversation was held with some of them in which it was suggested that the matter in controversy was better for the Earl of Kent than the bishop, it was decided, after much consideration among the judges, that the verdict should nevertheless be sustained.³

§ 395. The prevailing doctrine is, that something more must be shown than the mere separation of the jury to set aside the verdict; with the exception, however, in capital cases, when a separation of the jury, without the consent of the prisoner, is deemed sufficient to set aside a verdict rendered against him.⁴

¹ Too much strictness cannot be used to keep a jury, charged with the life and liberty of a citizen, from mingling with the community during their deliberations, and the more especially when there is any excitement for or against the prisoner. *Cochran v. State*, 7 Humph. 544.

² 1 Chitty C. L. 628. In *Stephens v. People*, 19 N. Y. 550, there is an elaborate and learned opinion relating to the separation of jurors.

³ 14 Henry VII. p. 29. In this case is also considered the conduct of jurors in eating and drinking during a trial.

⁴ *Adams v. People*, 47 Ill. 376; *Cane v. People*, 3 Neb. 357; *State v. Prescott*, 6 N. H. 287; *Minnesota v. Parrant*, 16 Minn. 178; *State v. Brannon*, 45 Mo. 329;

This position is the safest one to take; for there must be many occasions when a temporary separation of the jury, without being in charge of an officer, cannot possibly have led to any influence one way or the other upon them. It is, therefore, best to judge the effect of such separation by the attendant circumstances, and avoid laying down any absolute rule.

Wharton, in speaking of the different views on this subject observes: "The latter doctrine (strict imprisonment of the jury) was pressed with great vigor by the early common law authorities, in all cases both civil and criminal: it being agreed that by 'the law of England a jury after the evidence given upon the issue ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed.' A more humane system has since been recognized; and in all cases, not capital, it appears that juries are permitted to separate, whenever in the discretion of the court it seems proper."¹

§ 396. It is held that a separation is fatal to the verdict in Massachusetts, Tennessee, Virginia, Mississippi, and Texas.²

In an early case in Virginia, where the defendant had been convicted of grand larceny, it appeared that one of the jurymen, during a temporary adjournment of the court, went to the house at which he boarded without the officer of the court, and was absent fifteen or twenty minutes. The person with whom the jurymen boarded stated that he was in his room when he was called for dinner, and that the jurymen, except when dining, remained in his own room. Another jurymen, on the morning of another day of the trial, attended by the

People v. Douglass, 4 Cow. 26; *State v. Camp*, 23 Vt. 551; *State v. Babcock*, 1 Conn. 401; *State v. Miller*, 1 Dev. & Bat. 500; *Wyatt v. State*, 1 Blackf. 25; *People v. Ransom*, 7 Wend. 423; *McCreary v. Commonwealth*, 29 Penn. St. 323; *People v. Symonds*, 22 Cal. 348; *Quinn v. State*, 14 Ind. 589.

¹ *Crim. L.* § 3112. In Indiana, where, on the trial of an indictment for rape, one of the jurors left the box while the court was in session, walked out of the court-house, passed through the group of spectators, and, after a moment's stay, returned to the box; this fact furnished no ground for a new trial. *Porter v. State*, 2 Cart. 435.

² *Commonwealth v. Roby*, 12 Pick. 496; *McLain v. State*, 10 Yerg. 241; *Boles v. State*, 13 Sm. & M. 398; *Commonwealth v. State*, 3 Tex. 31.

officer, went to visit a sick child. They were absent about twenty minutes, and the officer remained below whilst the jurymen went upstairs to see his family, and was absent from the officer about five minutes. There was no proof of any actual tampering or conversation on the subject of the trial with the jurymen, and the court held that this was not necessary to be proved in order to set aside the verdict.¹

In *Woods v. State*,² in a capital case, the jury were allowed by permission to separate after hearing part of the evidence. During the time of their deliberation, some members of the jury were observed in the court-house yard talking and mingling with citizens. For this misconduct the verdict was set aside. The court say, in reference to keeping the jury together: "Time and experience have shown the wisdom of the common law, which forbids the separation of the jury in the trial of a capital case before they have been discharged of the prisoner, and an adherence to which, modified as it has been in some of its harsh features by modern practice, is best calculated to effect that end. Departures from the common law rule in capital cases should be as few as possible, and only allowed in extreme cases, and never for the comfort or convenience of the jurors."

§ 397. The Jury after retiring cannot separate otherwise than by Agreement or Permission. — It will not do to come to an agreement to disagree, as did a jury in a case in Indiana.³ They had retired to consider their verdict, and without the consent of the defendant, or the permission of the court, they agreed to return as a finding that they agreed to disagree, and sealed up the same and disbanded (having informed the bailiff they had agreed upon a finding, when the bailiff, acting on the faith of this, permitted them to go to

¹ *Commonwealth v. McCaul*, 1 Va. Cas. 271.

² 43 Miss. 364. The fact that the jury, after being sworn and impanelled for the trial of one charged with a capital offence, were permitted by the court to separate and "mix with the crowd attendant on the court," is not matter for arrest of judgment but for new trial. *Morgan v. State*, 48 Ala. 65. In capital cases, unless it appears that the separation of the jurors pending the trial was not followed by improper conduct on their part, nor by any circumstance calculated to exert an improper influence on the verdict, the conviction should be set aside. *Keenan v. State*, 8 Wis. 132.

³ *Short v. West*, 30 Ind. 367.

their homes). They did not meet again until the hour of eight the next morning, when they destroyed the finding agreed upon, and brought into court a general and special verdict against the defendant. It was held that this misconduct was a proper ground for a new trial.

In a case where the jury left the room forcibly and against the will of the constable, a finding subsequently returned by them was set aside.¹

§ 398. *Jurors drinking Intoxicating Liquor.*—Probably no rule in connection with a jury trial seems so absurd to us at the present day, as that which compelled the jury to be kept without meat or drink, fire or candle, until they agreed. This physical pressure, by which the jury were literally starved into a verdict, was deemed more effective in that day than mental persuasion or reasonable discussion. Like many old rules, adapted it may be to a rude age, this rule soon grew impracticable, and in various ways became obsolete; however, there has been no relaxation as far as drinking intoxicating liquor is concerned. No court could possibly overlook a breach of the rule in this respect. But where the juror or jurors eat or drank without permission of the court after retiring, it did not necessarily vitiate the verdict. The question was whether the irregularity was of such a nature as to affect the impartiality and purity of the verdict itself. So Lord Hale

¹ *Shepherd v. Baylor*, 2 South. 827. It frequently happens that jurors under the charge of an officer who has permission to take them to a hotel or restaurant for food, may mingle with the crowd, and the question whether this will be misconduct or not will depend upon the circumstances of each case. In a capital trial, slight circumstances showing that the jurors were spoken to in reference to the case, would perhaps be sufficient to show misconduct on the part of the jurors, sufficient to set aside their verdict. In *People v. Kelley*, 46 Cal. 356, in an indictment for rape, the jury were conducted, by the officer having them in charge, to the dining-room of a hotel, where they remained together for three quarters of an hour; it appeared that one of the doors of the room was open and accessible to strangers, and that the officer in charge was absent from the room for a few minutes during the period named. These facts were held insufficient to set aside the verdict; because there was no evidence showing that any one conversed with the jurors; and it was said by the court, that a few mere passing remarks between the jurors and strangers would not furnish ground for a new trial. So, in *State v. Turner*, 25 La. An. 573, it is held that the fact that a juror was for a moment out of the presence of the officer, when it does not appear that he had any communication with any other person, does not necessarily establish the presumption of misconduct.

says:¹ "If any one of the jury eat or drink without license of the court, before they have given up their verdict, they are finable for it. But though it be not at the charges of either party, anciently it was held it would avoid the verdict. But at this day the law is settled, that it is only a misdemeanor, finable in them that do it, but avoids not the verdict. But if it be at the charge, for the purpose, of the prisoner, and the verdict find him guilty, the verdict is good; but if they find him *not guilty*, and this appears, &c., the verdict shall be set aside, and a new trial awarded."

The same rule is laid down by Coke: "But if the jury eat and drink at the costs of a party after they are gone from the bar and before they are agreed, their verdict shall not be received if the verdict be for the same party that gave the meat and drink, for this induces affection."² So the same point was decided in *Rex v. Burdett*,³ by Chief Justice Holt.

§ 399. *Views in the United States.* — It was never the custom to treat juries here as they were formerly treated in England. Opportunity was always allowed them for refreshment; but in regard to the effect on the verdict of drinking intoxicating liquors by jurors, there is a difference in the decisions. Some holding that the drinking of any intoxicating liquor will render the verdict void; others holding that it will not necessarily, without some plain evidence of abuse.

§ 400. *Early cases in New York* held that the drinking of spirituous liquors, even in small quantities, by jurors, was a good ground for a new trial, without any further inquiry whether there had been any abuse in the particular instance.⁴ In the last case the court said: "We cannot allow jurors thus, of their own head, to drink spirituous liquor while engaged in the course of a cause. We are satisfied that there has been no mischief, but the rule is absolute, and does not meddle with consequences." But it was afterwards held, in *Wilson v. Abra-*

¹ 2 P. C. 306.

² Co. Litt. 227.

³ 2 Salk. 645. So, also, in *Duke of Richmond v. Wise*, 1 Ventr. 125.

⁴ *Bullard v. Shore*, 2 Cow. 430; *People v. Douglass*, 4 Cow. 26; *Brant v. Fowler*, 7 Cow. 562.

hams,¹ that misconduct of this kind, on the part of the jury ought not, *of itself*, to overturn the verdict, unless there be some reason to suspect that the irregularity may have had an influence on the final result. Bronson, J., commented upon and disapproved of the decisions in *Brant v. Fowler*, and *People v. Douglass*, *supra*, and laid down the following rule: "When, in the course of the trial, a juror has in any way come under the influence of the party who afterwards has the verdict, or there is reason to suspect that he has drank so much at his own expense as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he has no just sense of the responsibility of his station, the verdict ought not to stand. But every irregularity which would subject the juror to censure, whether in drinking spirituous liquor, separating from his fellows, or the like, should not overturn the verdict, unless there be some reason to suspect that the irregularity may have had an influence on the final result."

These views held in the New York cases give a summary of those held generally as to the effect on the verdict of jurors drinking intoxicating liquor. The view laid down in *Wilson v. Abrahams* seems to be the more reasonable and practicable rule.

§ 401. In New Hampshire and Massachusetts, it is held strictly that the drinking of intoxicating liquors is sufficient to set aside the verdict. In *Leighton v. Sargent*,² the court set aside a verdict because brandy was furnished to the jury and drank by several of them who complained of slight illness, while deliberating upon the cause after retiring to form their verdict. The court said: "The quantity drank was probably small, but we cannot consent that that fact should make a difference. We fully concur in the views of the learned judge in New York,³ 'It will not do to weigh and examine the quantity which may have been taken by the jury nor the effect produced.'" The same was held in *State v. Bullard*,⁴

¹ 1 Hill, 207.

² 31 N. H. 119.

³ *People v. Douglass*, 4 Cow. 36.

⁴ 16 N. H. 139. In *Gilmanton v. Ham*, 38 N. H. 108, it was held no serious misconduct when a juror took a half glass of brandy to check a diarrhoea.

where a verdict was set aside because some of the jurors, while they were deliberating on their verdict, took a little rum for their stomach's sake.

In Massachusetts¹ the jury was furnished with crackers, cheese, and cider, and no improper conduct being charged, the court refused to interfere. Chief Justice Shaw delivered a very able opinion reviewing the early authorities, but he held that cider was not objectionable, saying: "When the irregularities consist of doing that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as when ardent spirits are introduced, then it would be proper to set aside the verdict, because no reliance can be placed upon its purity and correctness."

§ 402. In several Southern States it is held that drinking spirituous liquors by jurors will not *per se* avoid the verdict. In *Jones v. State*,² the court, after examining the authorities, concluded that the weight of authority was against setting aside a verdict simply because the jury drank liquor during the time of their deliberation.

In North Carolina, on the trial of an indictment for murder, it appeared that victuals and coffee were handed through a window into the jury room, and the next morning a vessel was found there containing wine. There was no pretence that these were furnished either by the State or prosecutor, and on this ground the court refused a new trial.³

In Mississippi, at the suggestion of a juror who was a physician, the bailiff carried brandy, in a bottle, into the jury room, for another juror who was sick. The sick juror drank, but it did not appear that any other juror drank. The court refused a new trial, on the ground "that no effect which could in any way influence the verdict resulted from the introduction of the bottle of liquor into the jury room," or, in other words, that as intoxication was not produced, nobody was injured. The court said further: "If, indeed, the evidence closed with the truth of the naked fact, that ardent spirits,

¹ *Commonwealth v. Roby*, 12 Pick. 496. See *Parinton v. Humphreys*, 6 Greenl. 379.

² 13 Tex. 168.

³ *State v. Sparrow*, 3 Murph. 487.

in quantities sufficient to produce intoxication, were conveyed by the officer into the jury room, we should feel no hesitation in holding that the conviction should be set aside.¹

In Virginia, in *Commonwealth v. Thompson*,² a medical witness being accidentally present at a hotel where the jury were brought by the sheriff to be lodged for the night, invited some of them to drink, which they did, but though this was held highly objectionable, it was not sufficient to set aside the verdict.

In Tennessee a new trial will not be granted upon affidavits that the jury drank ardent spirits at their meals during the progress of the trial, without proof that they were thereby disqualified from duly considering the case. The irregularities charged must be considered positively and specifically, and be sustained by oath.³ In *Rowe v. Smith*,⁴ the jury partook of intoxicating liquor during the trial, but not to excess, nor so as to disqualify them; and on the authority of *Stone v. State* the verdict was sustained.

§ 403. In the Western States the ruling is different. In Iowa the courts have taken very decided ground against the use of intoxicating liquors by jurors during a trial. In *State v. Baldy*,⁵ after the jury had retired in charge of the bailiff, one of them was permitted to separate from the balance of the jury for a necessary purpose, and while out went to a grocery store to purchase some tobacco, and while there drank a glass of ale or lager beer, and then returned with the bailiff, in whose charge he was while absent, to the jury room. On appeal the judgment was set aside on account of this misconduct of the juror. There was no pretence that the juror was intoxicated. The court said: "The parties have a clear right to the cool, dispassionate, and unbiased judgment of each juror applied to the determination of the issue in the cause, and the use, in any degree, of that which stimulates the passions and has a tendency to lessen the soundness of judgment,

¹ *Pope v. State*, 36 Miss. 121.

² 8 Gratt. 637.

³ *Stone v. State*, 4 Humph. 27.

⁴ 11 Humph. 491. See, to the same point, *State v. Caulfield*, 23 La. An. 144.

⁵ 17 Iowa, 89.

is itself conclusive evidence that the party who has the right to the exercise of that dispassionate judgment has been prejudiced." In a subsequent decision in this State,¹ the same question came under consideration of the court, and it received a full examination, when the former ruling in *State v. Baldy* was confirmed.

In Illinois² a portion of the jurors, after they were sworn, and before the entire panel was made up, went to a grocery and drank spirituous liquor; the court thought it should not vitiate the verdict. In *State v. Upton*³ it was held that a verdict will not be set aside because the jury used intoxicating liquor in their retirement, unless it appeared that it was supplied from an improper source, or affected the verdict.

In a late case in Indiana, after the jury had been charged by the court, the bailiff went with two of the jurors to a liquor and billiard saloon, where other persons were drinking and playing billiards, and procured for the jurors some brandy, which they drank, and it was not shown where the other jurors were at the time said two were absent with the bailiff at the saloon. This was held a clear case of misconduct, sufficient to set aside a verdict against the prisoner.⁴

In a case in Ohio, during the consideration of the verdict in a criminal case, it was shown that about two o'clock in the night the deputy sheriff went with one of the jurors to a saloon, where the juror obtained and drank a glass of whiskey. The prisoner was granted a new trial for this and other misconduct of the jury.⁵

In Nevada, in *State v. Jones*,⁶ it was held that the mere drinking of spirituous liquors by a juror, when not furnished by the prevailing party, is not such irregularity or misconduct as will vitiate a verdict.

§ 404. Taking Papers or Books to Jury Room. — Jurors are not permitted to take with them any papers, or books,

¹ *Ryan v. Harrow*, 27 Iowa, 494.

² *Davis v. People*, 19 Ill. 74.

³ 20 Mo. 397.

⁴ *Davis v. State*, 35 Ind. 496.

⁵ *Weis v. State*, 22 Ohio N. S. 486.

⁶ 7 Nev. 408; *Richardson v. Jones*, 1 Nev. 405.

other than those committed to them by the court.¹ This is on the principle that their verdict must be based on the evidence given in court, and the law must be taken from the instructions given by the court. Where the jury in a trial for murder were permitted to take with them, when considering their verdict, a transcript of the record of the cause, containing the evidence before the magistrate, but were instructed that they must not read such record; it was held error to permit the jury to take with them and retain in their possession such transcript.² After the jury had retired, the bailiff, without the consent of the defendant or the leave of the court, furnished to them, at their request, a book on criminal law which had been read to them on the trial of the cause. This was held such misconduct on the part of the officer and jury as entitled the defendant to a new trial.³ So, a verdict was set aside on the ground that the jury, when they retired, carried with them, without the knowledge of the parties, and read a deposition which had not been offered in evidence, and which was material to the issues in the case.⁴

Even the court cannot send papers to the jury without the consent of the parties. Thus, where the court sent a copy of the General Statutes, unknown to the parties, it was held error.⁵

If papers written on and underscored for the purpose of attracting special attention, are passed to the jury without the knowledge of the opposing counsel and court, the verdict will be set aside.⁶

¹ Killen v. Sistrunk, 7 Geo. 283; Lonsdale v. Brown, 4 Wash. 148; Thompson v. Mallet, 2 Bay, 94; Flanders v. Davis, 19 N. H. 139; Lott v. Macon, 2 Strobb. 178; Co. Litt. 227; Vin. Abr. Trial, pl. 18.

² Atkins v. State, 16 Ark. 568.

³ Newkirk v. State, 27 Ind. 1.

⁴ Coffin v. Gephart, 18 Iowa, 256; Stewart v. R. R. Co. 41 Ibid. 62; Taylor v. Sorsby, 1 Miss. 97. Where, on a motion for a new trial, the fact appeared by affidavit of the sheriff that he had at the request of the jury brought to them in their room loose papers, purporting to be the evidence in the cause, not knowing what the papers consisted of, and no exculpatory explanations were given, it was held sufficient ground for a new trial. What effect the papers might have had on the verdict was immaterial. The act was illegal, and the verdict found by the jury was illegal. Pound v. State, 43 Geo. 88.

⁵ Merrill v. Navy, 10 Allen, 416. See State v. Smith, 6 R. I. 33.

⁶ Watson v. Walker, 23 N. H. 471. It is not proper to allow the jury to take

§ 405. Where no injury can result, no notice will be taken, as when it appears the jurors were not influenced, that they did not read them, or when the papers were accidentally sent to the jury room.¹ Thus, when the jury took with them to their room a deposition which had on motion been suppressed, and that a portion of it was read by one of the jurors, it will not constitute sufficient ground for setting aside the verdict, when it appears that such juror had prior to such reading made up his mind as to the verdict, and it appears that the other jurors did not read it, and that their minds were in no way influenced thereby.²

So, the fact that two jurors, whilst impanelled, read a newspaper report of the evidence which had been given in the case, which had no influence on their verdict, is not sufficient ground for a new trial.³

So, it is held that in order to justify the court in granting a new trial, for the reason that a paper, not read upon the trial, went to the jury room among other papers in the case, it must appear that the paper conveyed some information which by some reasonable intendment might have had an influence upon the verdict.⁴

A new trial was moved for on the ground that the constable, at the request of a juror, handed them a paper showing them the different degrees of punishments of the crime. It was held that they having afterwards been explicitly instructed by the court on the question of degree, their attempt to take into consideration the punishment could not be deemed to prejudice the defendant.⁵ So, where one convicted of murder moved for a new trial, on the ground that testimony taken at the inquest, being in the record, was accidentally in the jury room during their deliberations. It did not appear the jury read it, and the court thinking, if read, it added nothing to with them law books from which they may determine the law for themselves. *Harrison v. Hance*, 37 Mo. 185.

¹ *Bersch v. State*, 13 Ind. 434; *Riggins v. Brown*, 12 Geo. 271; *Tracy v. Card*, 2 Ohio N. S. 431.

² *Morris v. Howe*, 36 Iowa, 490.

³ *U. S. v. Reid*, 12 How. 361.

⁴ *Peacham v. Carter*, 21 Vt. 515.

⁵ *People v. Wilson*, 8 Abb. Pr. 187. It was not error for the judge to send a copy of the statutes, calling attention to sections relating to homicide. *Gandolfo v. State*, 11 Ohio N. S. 114.

the strength of the evidence given before the jury, refused the motion for a new trial.¹

§ 406. *Determining Verdict by Chance.* — The intent of the law is that a verdict shall be the result of intelligent discussion and reasonable conviction by the jury. It must be regarded as a case of decided misconduct when jurors so far forget their duties and the responsibility resting upon them as to resort to some mode of determining a verdict by chance. And whenever this mode of determining a verdict is resorted to it will vitiate it.²

And when the jury agreed that in the settlement of the amount of a verdict each should mark down the sum he was willing to allow, and that the aggregate amount should be divided by twelve, and the quotient taken for the verdict; it was set aside.³

Any agreement among jurors which in effect makes their verdict depend on chance, will cause the verdict to be set aside; as where they agree to unite in an average verdict, or that if nine agree on a verdict the other three shall unite with them.⁴

§ 407. Where there is no previous agreement to be bound by a quotient verdict, it is held it will not be wrong to adopt a verdict so obtained.⁵

Where jurors concurring in the guilt of the prisoner severally set down the time for which they think he should be confined in the penitentiary, and the aggregate is divided by twelve, and after the result is ascertained they all concur in it as their verdict; this was held not to be such misbehavior as should entitle the prisoner to a new trial.⁶

¹ *State v. Tindall*, 10 Rich. (S. C.) 212; *Hall v. Rupley*, 10 Penn. St. 231.

² *Donner v. Palmer*, 23 Cal. 40; *Ruble v. McDonald*, 7 Iowa, 90; *Thompson v. Perkins*, 20 Ibid. 486; *Birchard v. Booth*, 4 Wis. 67.

³ *Denton v. Lewis*, 15 Iowa, 301; *Manix v. Malony*, 7 Ibid. 81; *St. Martin v. Deanoy*, 1 Minn. 156; *Forbes v. Howard*, 4 R. I. 364; *Wilson v. Berryman*, 5 Cal. 44; *Elledge v. Todd*, 1 Humph. 43.

⁴ *People v. Barker*, 3 Wheel. Cr. 19.

⁵ *Dorr v. Fenno*, 12 Pick. 521; *Cowperwaite v. Jones*, 2 Dall. 55; *Heath v. Conway*, 1 Bibb (Ky.), 398; *Johnson v. Perry*, 2 Humph. 569; *Harvey v. Jones*, 3 Ibid. 157; *Barton v. Holmes*, 16 Iowa, 252; *Illinois, &c. R. R. Co. v. Able*, 59 Ill. 131.

⁶ *Thompson v. Commonwealth*, 8 Gratt. 637; *Crabtree v. State*, 3 Sneed, 302.

Where the jury agreed that to determine the amount of the plaintiff's damages each juror should mark a sum, and that half the aggregate of the highest and lowest sums marked should be taken for such damages, and made up and returned their verdict according to this agreement, it was held improper and set aside.¹

§ 408. *Affidavits of Jurors in Regard to Verdict.* — It is a well established rule of law that no affidavit shall be received from a juror to impeach his verdict.²

The reasons on which the rule is founded are obvious and sufficient. For "it might sometime happen that a jurymen, being a friend to one of the parties and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him."³ And it is said if the practice were adopted to receive affidavits, one juror might testify one way and another differently. "This would open a novel and alarming source of litigation, and it would be difficult to say when a suit was terminated."⁴

The affidavits of jurors cannot be received to show that the deponents, in agreeing to the amount of the verdict, took into consideration a cause of action in addition to that for which the suit was brought.⁵ Nor to explain their verdict, or to show that they intended something different from what they found;⁶ nor to show a mistake committed by them in making up their verdict, unless the mistake arises from circumstances passing at the trial, which are equivalent to a misdirection of the judge.⁷

¹ *Boynton v. Trumbull*, 45 N. H. 408.

² *Vaise v. Delaval*, 1 T. R. 11; *Prior v. Powers*, 1 Keb. 811; *Dana v. Tucker*, 4 Johns. 487; *Clum v. Smith*, 5 Hill, 560; *Meade v. Smith*, 16 Conn. 356; *Woodward v. Leavitt*, 107 Mass. 453; *O'Barr v. Alexander*, 37 Geo. 195; *Allison v. People*, 45 Ill. 37; *Hall v. Robinson*, 25 Iowa, 91; *Knowlton v. McMahon*, 13 Minn. 386.

³ Per Lord Mansfield, *Owen v. Warburton*, 1 N. R. 326.

⁴ *Robbins v. Wendover*, 2 Tyl. 11; *Willing v. Swasey*, 1 Browne, 123.

⁵ *Brownell v. McEwen*, 5 Denio, 367.

⁶ *Jackson v. Williamson*, 2 T. R. 281; *Rex v. Woodfall*, 5 Burr. 2667; *People v. Common Pleas*, 1 Wend. 297; *Jackson v. Dickinson*, 15 Johns. 309.

⁷ Ex parte Caykendoll, 6 Cow. 53.

§ 409. An affidavit made at a subsequent term to the trial, by a juror, that he was influenced by what he sets forth as the charge of the judge, is no ground for a new trial.¹ Nor an affidavit by four of the jury, made three weeks after the trial, that "the verdict was not their verdict, and that they had not agreed to it."² So, where a juror, upon being polled, assents to the verdict, he cannot be allowed to say that he was intimidated into compliance by the foreman.³

Affidavits are not admissible that one or more of the jurors misunderstood the charge.⁴ More especially where the affidavits are made several days after the verdict, or at the next term of the court.⁵

§ 410. An affidavit of a juror is received in support of the verdict, when attacked for misconduct on the part of the jurors.⁶ So, it may be received for the purpose of showing improper conduct of the successful party in approaching them on the subject pending the trial.⁷ Although affidavits of jurors will not be received to show misconduct of the jury, they are admissible to show misconduct of a party, or of the officer having charge of them.⁸

In *Eastwood v. People*⁹ it is held to have been a well settled rule for a long time, to admit affidavits of jurors in explanation of their conduct, but it is said it is an unreliable species of evidence.

A very early decision in England took strong ground against admitting the affidavit of a juror when impeached for misconduct. It arose in 1653, when a motion was made to set aside the verdict because some writing had been delivered to the jury by a stranger. Lord Hale, who was counsel in the case, and opposed the motion, produced the affidavit of the foreman

¹ *Campbell v. Skidmore*, 1 Tex. 475.

² *Reeves v. Moody*, 15 Rich. L. 312.

³ *Boetge v. Lander*, 20 Tex. 105.

⁴ *Davenport v. Cummings*, 15 Iowa, 219; *Holman v. Riddle*, 8 Ohio N. S. 384; *Morris v. State*, 3 Humph. 333.

⁵ *Handy v. Providence*, 1 R. I. 400.

⁶ *Dana v. Tucker*, 4 Johns. 487; *State v. Ayer*, 3 Fost. 301; *Hall v. Robinson*, 25 Iowa, 191; *Canon v. State*, 3 Tex. 31.

⁷ *Reynolds v. Transportation Co.* 9 How. Pr. 7.

⁸ *Thomas v. Chapman*, 45 Barb. 98.

⁹ 3 Park. Cr. 25.

of the jury that they had not looked at the writings. But the court refused to listen to the affidavit. Rolle, C. J., said: "The affidavit of the jury ought not to be allowed to make good their own verdict; for now they are, as it were, parties, and have offended, and shall not be allowed by their own oath to take off their offence."¹

In some States affidavits are received to show that a verdict was obtained by chance. In a case in California it is held that an affidavit of a juror cannot be received to impeach his own verdict, unless the verdict was arrived at by "a resort to the determination of chance."² So, it is held in Iowa that the affidavit of a juror is admissible to show the misconduct of the jury in the manner of making up their verdict.³

The decisions in New York hold the opposite view.⁴

In Tennessee it appears to be the practice to receive the affidavits of jurors to impeach the verdict of their fellows.⁵

¹ Case of Taylor & Webb, Trials per Pais, 225.

² Hoare v. Hindley, 49 Cal. 275.

³ Manix v. Malony, 7 Iowa, 81; Stewart v. R. R. Co. 11 Ibid. 62; Hendrickson v. Kingsbury, 21 Ibid. 379.

⁴ People v. Barker, 3 Wheel. Cr. 19; Green v. Bliss, 12 How. Pr. 428.

⁵ Crawford v. State, 2 Yerg. 60; Cochran v. State, 7 Humph. 544; Luster v. State, 11 Ibid. 169; Hudson v. State, 9 Yerg. 408. A defendant cannot, when the jury are being polled, question a juror in regard to the misconduct of the jury during the trial. Bassham v. State, 38 Tex. 622. It was not permitted the counsel to interrogate the jury as to what they intended by their verdict, when its terms and legal effect were unmistakable. Anderson v. Green, 46 Geo. 361.

CHAPTER X.

THE VERDICT.

- § 411. Meaning of.
- § 412. Several Kinds of.

PART I. GENERAL VERDICT.

- § 413. More commonly found in Criminal Cases.
- § 414. Must be certain.
- § 415. Must be for an Amount specified.
- § 416. Will be good if Amount can be ascertained.
- § 417. Must find no more than is demanded.
- § 418. Meaning and Effect of a General Verdict.
- § 419. What Defects are cured by.
- § 420. Defects not cured by.
- § 421. Verdict in Case of Two or more Defendants.
- § 422. General Verdict in Criminal Cases.
- § 423. When there are Several Counts.
- § 424. What a Verdict of Guilty implies.
- § 425. Where Different Offences are charged.
- § 426. The Jury may give a Partial Verdict.
- § 427. Where Different Grades of an Offence are charged.
- § 428. For a less Offence than that charged.
- § 429. This Rule of the Common Law generally adopted.
- § 430. Rule in New York.
- § 431. In Massachusetts.
- § 432. Addition of Irrelevant Matter.
- § 433. Where Several are indicted.
- § 434. In Cases of Riot and Conspiracy.

PART II. SPECIAL VERDICT.

- § 435. Definition of.
- § 436. Must find all Essential Facts.
- § 437. Facts cannot be supplied by Reference to Record.
- § 438. Must contain Fact, not Evidence of Facts.
- § 439. Effect of Special Finding on General Verdict.
- § 440. Power of Court over Special Verdict.
- § 441. Special Verdict in Criminal Cases.
- § 442. Facts must be strictly found in Criminal Cases.

PART III. SUFFICIENCY OF THE VERDICT.

- § 443. Requirements.
- § 444. Where less than the Issue is found.

- § 445. On Matter not in Issue.
- § 446. Where Verdict varies from the Issue.
- § 447. In Actions of Ejectment.
- § 448. The Variance of a Verdict from Indictment.

PART IV. SEALED VERDICT.

- § 449. When rendered.
- § 450. Time of returning a Sealed Verdict.
- § 451. Sealed Verdict in Criminal Cases.

PART V. RECEPTION OF THE VERDICT.

- § 452. In Open Court.
- § 453. A Verdict by Agreement rendered out of Court.
- § 454. Prisoner to be present.
- § 455. Verdict delivered on a Sunday.
- § 456. Amending the Verdict.
- § 457. Court may direct the Jury to amend.
- § 458. Directing an Amendment in a Criminal Case.
- § 459. When properly directed.
- § 460. Amending a Sealed Verdict.
- § 461. When Amendment should be made.
- § 462. Juror may dissent on Presentation.
- § 463. Amendment by the Court.
- § 464. Examination of Cases in Reference to.
- § 465. Polling the Jury.
- § 466. Conclusiveness of the Verdict.
- § 467. Final in one Instance.
- § 468. Conclusiveness as to Parties of Record.

PART VI. SETTING ASIDE THE VERDICT.

- § 469. For what Causes generally.
- § 470. Where the Jury disregard the Evidence.
- § 471. Where no Evidence to sustain.
- § 472. Where clearly against Weight of Evidence.
- § 473. Where the Evidence is conflicting.
- § 474. Where manifestly against Law.

THE VERDICT.

§ 411. *Meaning of Term.* — The great end and aim of all the efforts in impanelling the jury, and in the trial of the issue, is to secure a verdict of a jury on the matter in controversy. It would seem to be a finality, and so it was at one time; but in modern times it is not always so; there are many causes for which a verdict can be set aside. It may be for defect in form; for misconduct in jurors, or in a party; for uncertainty in its finding; for being contrary to evidence; for a want of conformity to the issues; for an improper direction in point

of law; and generally for any cause showing a wrong action of the jury through ignorance, prejudice, or wilfulness.

The very import of the term shows the faith with which men received this final action of a jury. It was called *verdict*, from *veritatis dictum*, a speaking or saying the truth of the matter in issue. It is defined to be "the unanimous decision made by a jury, and reported to the court, on the matters lawfully submitted to them in the course of the trial of a cause."¹

§ 412. *Several Kinds of Verdicts.* — The two kinds of verdict most commonly mentioned are, a *general verdict* and a *special verdict*.

A verdict was formerly, at the earliest institution of the jury system, general; that is, the whole matter in issue was found generally. Thus, if the issue was whether A. B. was seised of a certain fee, the jury found that A. B. was so seised, which was a general finding; whereas, if they had merely found certain facts from which, as a conclusion of law, the seisin could be inferred, they would have found a special verdict. The distinction has been thus pointed out: "The verdict is general when it finds the facts and the law, as, for instance, that a certain sale took place; it is special when it finds certain facts, leaving it to the court to decide whether those facts constitute a sale."²

It is of very great importance to distinguish between these two kinds of verdict, in order to ascertain whether the jury or the court has mistaken the law. It was formerly more common than it now is for courts to direct a special verdict, in order the more correctly to apply the law. We have seen how this power was resisted in the case of libel, until it brought forth the declaratory act known as Fox's Libel Act. It was also common for juries, in order to escape the consequences of attain, which were often severe, to bring in special verdicts.³

There was another kind of verdict formerly noticed; but

¹ Bouv. Law Dict. "Verdict."

² Chidoteau v. Dominguez, 7 Mart. 521.

³ Lord Coke recommends the jury to bring in a special verdict, in order thereby to escape the dangerous consequences if they mistake the law. 1 Co. Inst. 228. The practice of setting aside verdicts upon motion, and of granting new trials, superseded the use of attain; there being very few instances of attain in the

not now of any practical importance. This was a *privy verdict*. It is thus defined in Bacon's Abridgment.¹ "A privy verdict is so called, because what is thereby found ought to be kept secret until a verdict is given in open court." In modern times this kind of verdict is superseded by what is termed a *sealed verdict*, which is not generally permitted in trials for felonies. It was formerly the case likewise with a privy verdict, which could not be given in a case of felony; because the jury are directed, and ought in such case, to look upon the prisoner when they give their verdict.²

PART I. GENERAL VERDICT.

§ 413. **More commonly found in Criminal Cases.** — A general verdict is more commonly found in criminal than in civil cases, when the jury find an accused guilty or not guilty, thus finding the facts as charged in the indictment or accusation as well as the law. In civil cases a general verdict is one that finds for the plaintiff or the defendant, as the case may be, according to the plea or declaration of either party. It is commonly for a certain sum. Juries in such cases frequently make a mistake by adding to their verdict irrelevant matter which the law terms *surplusage*. Thus, it is not rare that juries add costs to a verdict, with which they have nothing to do, as that is a matter wholly within the regulation of law. Thus, it is held in Missouri that although costs are to be allowed, as a matter of course to the prevailing party, a verdict in favor of one party with a proviso that he shall pay the costs, is not void. So much of it as relates to the payment of costs should be regarded as *surplusage*.³

books later than the sixteenth century. Cro. Eliz. 309; 3 Bl. Com. 405. The proceeding was abolished by statute 6 Geo. IV. c. 50. The jury were empowered by statute Westminster 2 (13 Edw. I.), c. 30, to give special verdicts. The statute provided: "that the justices of the assize should not compel the jurors to say precisely whether it were disseisin or not, so as they stated the truth of the fact, and prayed the aid of the justices; but if they would say of their own accord, that it was disseisin, their verdict should be admitted at their own peril." Upon this statute, it became the practice for the jury, when they had any doubt as to the matter of law, to find a special verdict, stating the facts and referring the law arising thereon to the decision of the court.

¹ Verdict (B).

² Rex v. Ladsingham, 1 Ventr. 97; Raym. 193.

³ State v. Knight, 46 Mo. 83. A verdict that the jury agree that the plaintiff

A jury cannot award costs ; if they do it will not affect the residue of the verdict, if otherwise legal, and the part relating to costs will be rejected as surplusage.¹ The court may of its own motion reject a portion of a verdict as surplusage, and render judgment simply on a part.² So, in a suit by an attorney for services rendered to the defendant individually, and also as trustee, the jury found for the plaintiff an amount which they directed to be paid, part by the estate in trust and part by the defendant. It was held that the direction as to the manner of payment was mere surplusage and did not vitiate the verdict.³

§ 414. **The Verdict must be Certain.** — Although a verdict is not in form and does not find the technical issue raised by the pleadings, if it is at the same time a verdict that the court can understand, and there is no difficulty in concluding a verdict out of the finding in such case, it is the duty of the court to mould and work it into form according to the justice of the case.⁴ So, upon the rendition of a general verdict for the plaintiff, which was informal, the judge, after asking and receiving an explanation from the jury in open court, had it recorded accordingly and in proper form, and it was held that there was no error.⁵

A verdict in these words : " We the jury give judgment for the plaintiff to amount of note and interest amounting to " so many dollars, although not in technical form, contains the substantial requisites, and is sufficient.⁶ But where suit was brought on a promissory note on which were indorsed several credits, one of which was uncertain both in date and amount and was disputed on the trial, the jury found for the plaintiff

pay the costs, is bad. *Hall v. York*, 16 Tex. 18. A verdict for the plaintiff in ejectment, but giving costs to the defendant, is bad. *Allen v. Flock*, 2 Penn. St. 159.

¹ *Tucker v. Cochran*, 47 N. H. 54 ; *Coit v. Waples*, 1 Minn. 134.

² *O'Brien v. Palmer*, 49 Ill. 72.

³ *Bickham v. Smith*, 62 Penn. St. 45.

⁴ *Jones v. Julian*, 12 Ind. 274 ; *Russell v. Wheeler*, 1 Hemp. 3 ; *Lowry v. Brown*, 3 Sneed, 17.

⁵ *Haycock v. Greup*, 57 Penn. St. 438.

⁶ *De Ford v. Furniss*, 43 Miss. 132. Verdict in an action for the value of a horse. " We the jury find the value of the horse to be \$150." Held no judgment could be had thereon. *Eno v. Hunt*, 8 Iowa, 436.

"for principal, interest, and costs," it was held that the verdict was too uncertain to authorize a judgment to be entered thereon for any definite sum.¹

In an ejectment suit the jury found a verdict "for the plaintiff in the sum of thirty dollars." This was held good as a general verdict for the plaintiff, and that judgment for possession might be entered thereon.²

§ 415. The verdict must be for an amount specified where the action is upon a contract or for damages. Thus, a verdict, "that we find the matters in controversy in favor of the plaintiffs for the amount of the account," is bad, as the court cannot enter judgment for any amount upon such finding.³ So, on a bill by legatees against the executors for account and settlement, a verdict that one executor was not liable, and that the other should turn over to certain legatees certain notes, was illegal, as not disposing of the issues. There should have been a money verdict for the amount of the notes.⁴

Where a verdict in an action for services on a contract was rendered "in favor of the plaintiff for four hundred and eighty dollars, with interest after the first day of June, 1864," it was

¹ *Jackson v. Jackson*, 40 Geo. 150.

² *Daniels v. R. R. Co.* 35 Iowa, 129. A verdict defective in form may be reformed by the court when the intention of the jury can be ascertained from data given in the verdict or referred to in the pleadings; but the court cannot supply an omission to name the amount of the finding by reference to evidence outside the court record. *Edwards v. McCaddon*, 20 Iowa, 520. A verdict which finds the issue for the plaintiff, and assesses his damages, is sufficient. *Insurance Co. v. Wright*, 22 Ill. 462. In an action for tort the jury found one defendant guilty, not ascertaining which, and found nothing as to the other; the verdict was held insufficient. *Richards v. Sperry*, 7 Wis. 219. The verdict of a jury in these words, "Verdict in favor of plaintiff," is not sufficient to form the basis of a judgment. *Hampton v. Waterston*, 14 La. An. 239. But where in trespass upon the general issue the jury found "for the plaintiff," and assessed damages, it was held that the verdict was sufficient. *Dyer v. Hatah*, 1 Ark. 339. In an action for freight and demurrage a verdict, "We find for the plaintiff, and are of opinion that the plaintiff has already received out of the property of the defendant payment in full for the amount of freight to which he is entitled," was set aside for uncertainty. *Diehl v. Peters*, 1 Serg. & R. 367.

³ *Neville v. Northcutt*, 7 Coldw. 294; *Knickerbocker Mining Co. v. Hall*, 3 Nev. 194.

⁴ *Shell v. Sanders*, 46 Geo. 469.

held to be a general verdict and good, the answer having been a general denial.¹

A verdict in figures, with the symbolical prefix (§) denoting dollars, is good in an action of tort.²

Where the verdict of the jury did not, in terms, specify the amount in dollars, but that the plaintiff should have and recover \$8 per month from the date of the commencement of the suit to the rendition of the verdict, it was held that such verdict was not liable to the objection of uncertainty.³

A verdict naming a certain sum will not be bad because the jury append additional matter not affecting the general verdict. As in an action to recover money alleged to have been fraudulently obtained by the defendants, agents for the plaintiff in effecting a sale of lands, a verdict, "We the jury find for the plaintiff, and assess his damages at two hundred and seventy-five dollars," was held not to be vitiated by an additional sentence: "The jury in their verdict decline to impute improper motives to the defendants in the matter in controversy."⁴

Where, in an action for money had and received, the jury rendered a verdict for a certain sum, "and interest," such verdict was defective, it being the duty of the jury to compute the interest; but the plaintiff may take judgment for the principal alone.⁵

We are not inclined to accept this case as sound law; for it has been held repeatedly that a verdict will not be bad if the amount can be determined by a computation, on the maxim, *Id certum est quod certum reddi potest*.⁶

¹ Educational Association v. Hitchcock, 4 Kan. 36.

² Mayson v. Sheppard, 12 Rich. 254.

³ Secrest v. Jones, 30 Tex. 596.

⁴ Dunlop v. Hayden, 29 Ind. 303; Gover v. Turner, 28 Md. 600.

⁵ Parker v. Fisher, 39 Ill. 164.

⁶ Secrest v. Jones, 30 Tex. 596; Gaff v. Hutchinson, 38 Ind. 341; Barrett v. Wills, 4 Leigh, 114; Burton v. Anderson, 1 Tex. 93. Where the jury brought in a general verdict for the plaintiff in an action for obstructing a right of way, it was not error for the court to send them out to assess the damages. Fisher v. Farley, 23 Penn. St. 501. Permission was given to a jury in charge of a case to disperse on finding a verdict. The jury agreed upon a verdict of, "We the jury find for the plaintiff." The next morning the court directed this verdict to be amended according to the statement of the foreman, in presence of the jury, as to the amount of damages which they intended to find. It was held such amend-

§ 416. The verdict is good if the amount can be ascertained, either from the complaint or declaration, or by means of computation. Thus, in a suit on a note, a verdict finding for the plaintiff "principal, interest, and cost," not stating the amount, is equivalent to finding the sum which the declaration shows on its face to be due, and is sufficiently definite.¹

So a verdict for "seven hundred dollars, the amount of the note sued on, with legal interest from the maturity of the note," is sufficiently certain.²

And where a verdict is for "principal, interest, and costs, and 12½ per cent. damages," it will be presumed that the "principal" meant is the principal claimed in the declaration, which presumption is strengthened if judgment is entered up for that sum as principal without exception by the defendant.³

When the jury find for the plaintiff "the full amount claimed," the amount must be ascertained from the allegations and prayer of the petition.⁴

When the jury fix an amount depending upon some event certain, or give interest from a day which can be ascertained, the verdict will be good. Thus, the day of trial is a matter of record, and the rate of interest is fixed by statute; therefore a verdict "for the plaintiff, a judgment for the amount due on said note, with legal interest less \$51, with interest on the same from January, 1856," is sufficiently certain, and is good.⁵

In an action on a note, the jury "found for the plaintiff the

ment was proper. *Barnes v. Strohecker*, 17 Geo. 340. In a suit for shooting plaintiff's mules, defendant pleaded that the mules had broken into his inclosure, and were destroying his crops, &c. The jury found "the damages to be equal, and that each party pay equal proportions of the costs incurred and go out of court." It was held that no judgment could be rendered on this verdict, it not being responsive to the issue. *Ford v. Taggart*, 4 Tex. 492. Under the Code of Kentucky, a verdict is sufficiently certain which finds for the plaintiff the debt mentioned in the petition. *Brannin v. Foree*, 12 B. Mon. 506.

¹ *Jackson v. Jackson*, 47 Geo. 99; *James v. Wilson*, 7 Tex. 230.

² *Parker v. Leman*, 10 Tex. 116; *Hattenback v. Haskins*, 12 Iowa, 109.

³ *Phillips v. Behn*, 19 Geo. 298; *Beckwith v. Carleton*, 14 Ibid. 691.

⁴ *Newton v. Kerr*, 14 La. An. 704. Where, in an action of forcible entry and detainer, the jury returned a verdict which, though informal in omitting to state the result, it was yet sufficient when the court was able to compute it. *Gibson v. Lewis*, 27 Mo. 532.

⁵ *Darden v. Matthews*, 22 Tex. 320.

amount of the note and interest." The clerk assessed the damages thereupon, and entered judgment by order of the court. This was held no error.¹

§ 417. The verdict must find no more than is demanded in the complaint or declaration.² The jury cannot go outside the issue and give anything more than plaintiff or defendant requires. Thus, when a jury returns a verdict for a specific sum, "subject to a set-off (of a certain number of dollars), if such set-off has not been already paid," judgment should be rendered for the sum specified, and the rest of the verdict should be rejected as surplusage.³ So, a verdict for a sum greater than that claimed cannot be cured by a remittitur of the surplus amount, when the record shows clearly that the defendant's side of the case was never considered by the jury.⁴

If both parties and the judge at the trial of an action on a promissory note treat the case as if the plaintiff is entitled to a verdict for the entire amount or nothing, he cannot afterwards claim a verdict for a part only.⁵

If in a verdict more is found than is necessary, it may be disregarded as surplusage.⁶

Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue as the parties state it; and when it appears to the court that the jury have found differently from the substance of the declaration, no judgment will be entered thereupon.⁷

§ 418. Meaning and Effect of a General Verdict. — A general verdict for the plaintiff is applicable to every issue well pleaded in his declaration.⁸

¹ *McGregor v. Armill*, 2 Clarke, 30.

² Where a man brought an action for debt and declared for £20, the jury found a verdict for £40; and this was held bad, for the plaintiff cannot recover more than he demands. 3 Salk. 375.

³ *Hawkins v. House*, 65 N. C. 614.

⁴ *Koeltz v. Bleckman*, 46 Mo. 320.

⁵ *Lincoln v. Lincoln*, 12 Gray, 45.

⁶ *Windham v. Williams*, 27 Miss. 313; *Ranney v. Bader*, 48 Mo. 539.

⁷ *Garland v. Davis*, 4 How. (U. S.) 131.

⁸ *Hamilton v. Rice*, 15 Tex. 382; *Hardy v. De Leon*, 5 Tex. 211; *Eiseman v. Swan*, 6 Bosw. (N. Y.) 668; *Parker v. Fisher*, 39 Ill. 164.

One general verdict may be a sufficient finding upon several issues, when all the issues must necessarily be passed upon in order to the finding of such verdict.¹

A general verdict, being an entirety, cannot be set aside as to one count and sustained as to another.² But where both counts of a declaration *relate to the same cause of action*, and one is good and the other is bad, a verdict for entire damages on the whole declaration will be supported, upon motion in arrest, by being applied to the good count.³ So, it is held that a general verdict, where part of the counts are good, will stand. As matter of practice, the party should ask the jury to disregard the bad counts.⁴

So, it is held in Indiana that one good count would sustain a general verdict, though the defendant should ask to have the jury assess on that count alone; and where the record was silent, this was supposed to have been done. The code has not changed the statutory rule of law in that State.⁵

Wherever the general issue and a special justification are pleaded, and a verdict is found for the plaintiff on the general issue, if it is apparent that the verdict could not have been so found if the special plea had been supported, the omission is matter of form only.⁶

A general verdict "for the plaintiff" in ejectment was held to find both issues in his favor, viz, that plaintiff was the "absolute owner in fee simple," and that defendant "unlawfully withheld the possession from him."⁷

Where, in an action for the breach of a contract, the answer denies the contract as stated in the petition, and sets forth the contract sued upon in different terms, and claims damages for its breach, a verdict that the defendant is entitled to recover of the plaintiff a specified sum is sufficiently responsive to the

¹ Cheswell v. Chapman, 42 N. H. 47.

² Frye v. Moor, 53 Me. 583.

³ Aldrich v. Lyman, 6 R. I. 98; Smith v. Cleveland, 6 Met. 332; 5 Bac. Abr. 349.

⁴ Peoria, &c. Ins. Co. v. Whitehill, 25 Ill. 466. A general verdict is good, where out of several counts there is one good one to which the evidence applies. State v. Pace, 9 Rich. 355.

⁵ Indianapolis R. R. Co. v. Taffe, 11 Ind. 458.

⁶ Browning v. Skillman, 4 Zab. 351.

⁷ Allard v. Lamirande, 29 Wis. 502.

issues. It in effect finds that the contract was as set forth in the answer, and not as set forth in the petition.¹

§ 419. What Defects are cured by Verdict. — Formal defects in the pleadings, as the imperfect statement of a cause of action, the omission of certain formal allegations, are cured by a general verdict.²

Thus, if it be not alleged in the declaration in an action of trespass that the trespass charged was committed upon a day certain, it is bad upon demurrer; but the omission of such allegation is cured by a verdict; for as the day is not material in an action on trespass, the court will, in support of the verdict, intend that the trespass was proved to have been committed upon a day antecedent to the commencement of the action.³ And where, in an action for slander, the declaration, without laying any time, alleged a trial before a justice of the peace, at which the plaintiff was sworn as a witness, and in reference to which words imputing perjury to the plaintiff were spoken, it was held that the verdict aided the omission of proof that the person before whom the trial was had was a justice of the peace and had jurisdiction of the case, although the proof showed that the trial was had in October, 1841, after

¹ *Markward v. Doriat*, 21 Ohio N. S. 637. A finding by the jury for the plaintiff, on an issue to the merits, includes all the facts necessary to the ascertainment of the defendant's liability, unless a statute requires the facts to be specially found. *Welch v. Fourier*, 6 Ala. 516. A verdict by a jury finding the plaintiff to be entitled to a certain amount of damages is not void for uncertainty, it being equivalent to saying that they found the issues in favor of the plaintiffs, and assessed the damages at the sum. *Mendelsohn v. Anaheim Lighter Co.* 40 Cal. 657. Where the jury by their verdict "find the issues joined in the cause" in favor of one of the parties, this is to be taken as a verdict finding each and all of the issues therein for such party. *Sites v. Haverstick*, 23 Ohio N. S. 626. Where, in an action of trespass, the declaration contained two counts, one at common law and the other under the statute, and a general verdict is found, it will be presumed that it was for single damages. *Cooper v. Maupin*, 6 Mo. 624. A general verdict cures all defects, imperfections, or omissions in the petition or statement of the cause of action, whether of substance or of form, if the issue joined be such as requires proof of the facts imperfectly stated or omitted, though it will not cure or aid a statement of a defective title or cause of action. *De Witt v. Miller*, 9 Tex. 245; *McLellan v. State*, 22 Ibid. 409.

² *Read v. Chelmsford*, 16 Pick. 128; *Coleman v. Craysdale*, 3 J. J. Marsh. 541; *Dickerson v. Hays*, 4 Blackf. 107; *Russell v. Slade*, 12 Conn. 455; *Emerson v. Lakin*, 10 Shep. 384; *Richardson v. Eastman*, 12 Mass. 505; *Ins. Co. v. Seitz*, 4 Watts & S. 273.

³ *Acton v. Eels*, Salk. 662; 5 Mod. 287.

the office of justice of the peace had been abolished and that of magistrate substituted.¹

A defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict.²

§ 420. The defects which are not cured by a verdict are those relating to the *gist* of the action; for where there is an omission to state a title or a cause of action, it cannot be supplied or cured by a verdict; nor will a verdict cure a statement of a bad cause of action.³ So, when the declaration in an action of trespass, brought by a master for the beating of his servant, did not allege that by reason of the beating the plaintiff was deprived of the service of such servant, the omission was held not cured by verdict, the loss of service being the gist of the action.⁴ And where *knowledge* of a party to be charged is the gist of the action, an omission to charge such knowledge is not cured by verdict; as when a defendant was sued for keeping a vicious bull, and it was not stated that he knew the bull was accustomed to run at persons.⁵ So, in an action for a deceit in a sale by a false affirmation, knowledge of the fraud or *scienter* is the gist of the action, and an omission is not cured by the verdict.⁶ The rule is well stated in *Stansbury v. Nichols*⁷ to be, that the verdict or decree cures all defects, imperfections, or omissions in the relation or statement in the cause of action, in substance or form, if the issues be such as to require proofs of the facts imperfectly stated or omitted; but it will not cure or aid a statement of a defective title or cause of action.

§ 421. General Verdict in case of Two or more Defend-

¹ *Morgan v. Livingston*, 2 Rich. 573.

² *Dale v. Dean*, 16 Conn. 579; *Nerot v. Wallace*, 3 T. R. 25.

³ *Crouther v. Oldfield*, Salk. 365; *Stilson v. Tobey*, 2 Mass. 520.

⁴ *Anon.* 1 Bulstr. 163.

⁵ *Buxendin v. Sharp*, Salk. 662.

⁶ *Bayard v. Malcolm*, 2 Johns. 550.

⁷ 30 Tex. 145.

ants. — In actions upon contract where the liability is joint, the jury cannot render a verdict against some of the defendants, and find the others not liable, but it is otherwise in actions for torts.¹ But in an action on a joint contract, the jury may find for one defendant who pleads infancy, and for plaintiff against the others.²

Where, in an action on contract, the jury is sworn *tam ad triandum ad inquirendum*, it is their duty, if they find for the plaintiff, to assess entire damages against the defendants, and it is error to receive a separate verdict against each defendant.³

Where, in a suit against two, the jury find against both the defendants upon the first paragraph of the complaint, and against one of the defendants upon the second paragraph, and there is no finding as to the other defendant upon the second paragraph, the verdict is insufficient for not finding the whole issue, and a *venire de novo* should be awarded.⁴ In actions of trespass the jury may find all the defendants guilty, or some of them. Thus, where in trespass against several there was a general verdict of guilty against all, it was held competent for the jury, on being called back immediately after leaving the court room, to correct the verdict by finding against part only.⁵

In an action of trespass against several defendants, a general verdict for the plaintiff is equivalent to finding all the defendants guilty, and the clerk can so record the verdict.⁶

An action was brought against eight defendants, who filed a joint answer denying the allegations of the petition. The jury rendered a verdict in favor of the plaintiff against four of the defendants by name, and made no finding either for or against the other defendants. After verdict the plaintiff dis-

¹ Milne v. Huber, 3 McLean, 312; Hair v. Little, 28 Ala. 236; Creed v. Hartmann, 29 N. Y. 591.

² Hartness v. Thompson, 5 Johns. 160.

³ Day v. Brawley, 1 Penn. St. 429.

⁴ Jenkins v. Parkhill, 25 Ind. 473.

⁵ Prussel v. Knowles, 4 How. (Miss.) 90.

⁶ Sutliff v. Gilbert, 8 Ohio, 405. One of several defendants, sued jointly for a tort, is entitled to a verdict before the case of his co-defendants is submitted to the jury, if the testimony is such that if he were sued alone he would be entitled to a nonsuit; and this is not a matter of discretion, but of right. Dominick v. Eaker, 3 Barb. 17.

missed the action as to the defendants not embraced in the finding of the jury, and the court rendered judgment against the remaining defendants in accordance with the verdict. The eight defendants then joined in a petition in error to reverse the judgment. It was held: 1. That the defendants as to whom the suit was dismissed were not prejudiced by the judgment against their co-defendants. 2. That the dismissal of the suit as to part of the defendants, without a finding of the issues as to them, when as in this case all the defendants are sued as principals in an unlawful transaction, constitutes no ground on which the remaining defendants can ask a reversal of the judgment.¹

§ 422. **General Verdict in Criminal Cases.** — The verdict in a criminal case is called *general* on the whole charge (which the jury are at liberty to find in all cases, both upon the law and fact of the case);² or *partial* as to a part of the charge; as where the jury convict the defendant on one or more counts of the indictment, and acquit him of the residue; or convict him on one part of a divisible count and acquit him as to the residue; or it may be *special* where the facts of the case alone are found by the jury, the legal inference to be derived from them being referred to the court.³

For the present we shall confine our attention to the cases of a general and partial verdict.

§ 423. **When there are Several Counts.** — It is usual in an indictment to charge the offence under different counts; and where an accused is tried on an indictment of several

¹ Mead v. McGraw, 19 Ohio N. S. 55. In an action on the case against several railroad companies for damages to perishable goods delayed in transportation, a verdict of guilty may be found against part of the defendants and of acquittal as to the others. Baker v. R. R. Co. 42 Ill. 73. Where two are sued jointly for trespass upon land, and the declaration alleges joint trespasses on certain days, there may be a verdict against both jointly, and a joint assessment of damages in which they united; but there cannot be a verdict against both jointly, and a separate assessment of damages against each for any trespasses committed by them separately at different times. Bosworth, Sturtevant, 2 Cush. 392.

² Co. Litt. 228; 4 Bl. Com. 361.

³ Arch. Crim. Pl. & Ev. 146, 147, 13th London ed.; McGuffie v. State, 17 Geo. 497; People v. Wells, 8 Mich. 104. The only verdict in a criminal case that a jury can render under the laws of Louisiana is a general one; a verdict of guilty or not guilty. State v. Jurché, 17 La. An. 71.

counts, which really charge but one offence, a general verdict of guilty is valid if any one of the counts are good and proved by the evidence.¹ And when the jury return a general verdict of guilty upon an indictment containing several counts, it will be presumed that they found the prisoner guilty of all.² If there are two counts in the indictment, a general verdict may be rendered on the only count upon which the prisoner could be tried and convicted. If the jury in returning their verdict, write "account," instead of "count," the court may correct this mistake in orthography.³

Where there are three counts in a bill of indictment, and testimony is offered with respect to one only, a verdict, though general, will be presumed to have been given on that count to which the testimony was applicable.⁴

Where a prisoner is found guilty generally under an indictment containing two counts, neither of which is defective, it is no ground of objection to the verdict that it does not state upon which count it was found.⁵

§ 424. A general verdict of guilty implies that all the facts which are well pleaded in an indictment are specially found, and the offence in the manner and form as charged.⁶ But the words "as charged in the indictment" after the words "we the jury find the defendant guilty," are mere surplusage.⁷

Where by statute the stealing of property worth thirty-five dollars is grand larceny, and an indictment charges larceny of

¹ *Guenther v. People*, 24 N. Y. 100; *State v. Bean*, 21 Mo. 269; *State v. Burke*, 38 Me. 574; *Hazen v. Commonwealth*, 11 Harris, 355; *Brown v. State*, 5 Eng. 607; *Isham v. State*, 1 Sneed, 111; *Hudson v. State*, 34 Ala. 253; *Commonwealth v. Howe*, 13 Gray, 26; *Stoughton v. State*, 2 Ohio N. S. 562; *Bulloch v. State*, 10 Geo. 47; *United States v. Burroughs*, 3 McLean, 405; *State v. Miller*, 7 Ired. 275; *Montgomery v. State*, 40 Ala. 684; *Parker v. Commonwealth*, 8 B. Mon. 30; *People v. Stein*, 1 Park. Cr. 246; *State v. Montgomery*, 28 Mo. 594; *State v. Shelledy*, 8 Iowa, 477; *State v. Mayberry*, 48 Me. 218; *State v. Scripture*, 42 N. H. 485.

² *State v. Fuller*, 34 Conn. 280; *Parker v. Fisher*, 39 Ill. 164; *Moody v. State*, 1 W. Va. 337.

³ *Roberts v. State*, 14 Geo. 8.

⁴ *State v. Long*, 7 Jones (N. C.), 24.

⁵ *Scott v. State*, 31 Miss. 473; *People v. Davis*, 36 N. Y. 77.

⁶ *Fitzgerald v. People*, 49 Barb. 122; *Bond v. People*, 39 Ill. 26; *Lowell v. State*, 45 Ind. 550.

⁷ *State v. McCombs*, 13 Iowa, 426.

property worth thirty-five dollars, a general verdict of "guilty" sufficiently implies that to be the value of the property."¹

Judgment will not be arrested because a jury omitted to state upon what particular count in an indictment for arson they found defendant guilty, when the first count was the only one charging the defendant.²

§ 425. Where different offences were charged in the several counts of an indictment, a verdict of guilty on some counts is equivalent to an acquittal on the remaining counts.³ A complaint charged malicious mischief to two animals as one offence. The jury found the defendant guilty as to one, and said nothing as to the other. It was held the defendant was acquitted as to that other.⁴

Where an indictment contains four counts, and the jury find the defendant guilty upon three of them, without any express finding upon the other, such finding is sufficient to warrant a judgment, and is tantamount to an acquittal as to the count upon which there was no express finding; and where a new trial is granted in such a case, it should be confined to the three counts on which he was found guilty.⁵

§ 426. The jury may acquit the defendant of a part and find him guilty as to another part, or upon one part of a count capable of division and not guilty of the other part; as on a count for composing and publishing a libel, the defendant may be found guilty of publishing only.⁶ But if upon an

¹ *Schoonover v. State*, 17 Ohio N. S. 294.

² *State v. Jones*, 69 N. C. 364.

³ *State v. Hill*, 30 Wis. 416; *Nabors v. State*, 6 Ala. 200; *Girts v. Commonwealth*, 22 Penn. St. 351.

⁴ *Hayworth v. State*, 14 Ind. 590.

⁵ *Morris v. State*, 8 Sm. & M. 762. This is a well recognized rule in criminal law, that if a jury acquit on some counts of an indictment, in case of a new trial, the prisoner can be tried only on those counts on which he was found guilty. This, however, only applies where the counts charge specific offences. *State v. Malling*, 11 Iowa, 239; *Campbell v. State*, 9 Yerg. 333; *Slaughter v. State*, 5 Humph. 410; *Hunt v. State*, 25 Miss. 378; *Brennan v. People*, 15 Ill. 511; *Jordan v. State*, 22 Geo. 545; *Jones v. State*, 13 Tex. 168; *State v. Kattelman*, 35 Mo. 105. Where the counts charge different degrees of the same offence, it is not generally agreed as to what counts the prisoner can be retried on. See *Bishop, Crim. Proced.* vol. 1, § 1011, and cases there cited.

⁶ 1 Chitt. C. L. 637.

indictment containing two distinct charges of different offences, punishable differently, a general verdict of guilty is rendered, a new trial will be granted.¹ Yet, in general, where from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue, as where he is charged with engrossing one thousand quarters of wheat, and the evidence proves but seven hundred.²

A person indicted for breaking and entering a warehouse with intent to steal, and also with stealing, may be convicted of the larceny simply.³

In *State v. Cowell*,⁴ on an indictment for fornication and adultery, the jury having found that the defendants were guilty of fornication, but not of adultery, it was held the State was entitled to judgment.

It is not material of what part of the charge the defendant is acquitted, if that part of which he is found guilty constitutes a specific indictable offence.⁵

Under an indictment charging an assault with intent to abuse and carnally know, the defendant may be convicted of an assault with intent to abuse simply.⁶

§ 427. Where different grades of an offence are charged, a general verdict of guilty, without specifying of which the jury found the prisoner guilty, will be presumed as finding him guilty of the highest grade of the offence charged.⁷ So, where an indictment contains two counts, one for assault with intent to murder by using a knife, &c., and the others for stabbing, and the jury brought in a general verdict of guilty, it was held there was no misjoinder of counts, and that by presumption of law the general verdict of guilty was intended

¹ *State v. Montague*, 2 McCord, 257.

² 1 Chitt. C. L. 637.

³ *State v. Cocker*, 3 Harr. 554; *State v. Grisham*, 1 Haywood, 12.

⁴ 4 Ired. 231.

⁵ *Durham v. State*, 1 Blackf. 33.

⁶ 3 Stark. C. N. P. 62.

⁷ *Conkey v. People*, 1 Abb. App. Dec. 418; *Bulloch v. State*, 10 Geo. 47; *People v. McGeery*, 6 Park. Cr. 653.

as a verdict of guilty of the highest offence charged in the indictment.¹

Where different degrees of an offence are charged in different counts of an indictment, it is the better practice for the verdict to state under which count he is found guilty.²

On an indictment for assault and battery, the verdict was: "We find the defendants guilty of an assault, but not with the intention of injuring the parties, and not of the battery." It was considered to be doubtful what the jury meant, and so a new trial was granted.³

It is not necessary for the jury on convicting a criminal to specify in their verdict the degree of the crime, unless they convict of a crime inferior in degree to that charged in the indictment.⁴

§ 428. Verdict for a Less Offence, than is charged. — It was within the power of the jury at common law to bring in a verdict, in certain cases, for a less offence than that charged in the indictment. For there are several cases where a greater offence includes a less, and upon an indictment for the greater offence the jury may find the prisoner guilty of the less. For instance, in an indictment for murder, the jury may find the prisoner not guilty of the murder, but guilty of manslaughter.⁵ Upon an indictment for burglary and larceny, the jury may find the prisoner not guilty of the burglary, but guilty of the larceny.⁶ Upon an indictment for robbery the jury may find

¹ *Dean v. State*, 43 Geo. 218.

² *Carter v. State*, 20 Wis. 647.

³ *State v. Izard*, 14 Rich. 209.

⁴ *State v. Matrassy*, 47 Mo. 295; *Hanna v. People*, 19 Mich. 316. But in some States it is required that the jury shall specify the degree of the crime; as in Alabama, *Robertson v. State*, 42 Ala. 509; Indiana, *Rose v. State*, 33 Ind. 167; California, *People v. Campbell*, 40 Cal. 129.

⁵ 2 Hawk. c. 47, §§ 4, 5; 2 Hale P. C. 302. See *State v. Coleman*, 5 Ala. 32; *State v. Peterson*, 2 La. An. 921; *State v. Butman*, 42 N. H. 490.

⁶ 2 Hawk. c. 49, § 11. A prisoner having been indicted and charged with both burglary and larceny, was found guilty of burglary only. The judgment was reversed on error and a new trial was held on the same indictment, when the jury found a verdict of guilty of larceny and were discharged. It was held that the first verdict was an acquittal of larceny; that the second was therefore a nullity; that the second jury ought to have found a verdict as to the burglary; and that their discharge without doing so operated as an acquittal of burglary. *Bell v. State*, 48 Ala. 684.

the prisoner not guilty of the robbery, but guilty of the stealing from the person, or guilty of an assault with an intent to rob.¹

§ 429. These rules of the common law are adopted in our States, either expressly by statute or under judicial construction. Thus, in an indictment for assault with intent to kill, the defendant may be convicted of assault and battery, or assault alone.²

So, a defendant indicted for assault and battery with intent to murder, may be convicted of a simple assault and battery. Greater offences include the lesser of a kindred character.³

But on a charge of murder the prisoner cannot be convicted of involuntary manslaughter.⁴

§ 430. Rule in New York. — The New York Revised Statutes provide that upon an indictment for any offence consisting of different degrees, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence, inferior to that charged in the indictment of an attempt to commit such an offence.⁵ It was held in *People v. Jackson*⁶ that this provision of the statute has not affected the common law rule respecting the right to convict of an in-

¹ *Rex v. Walls*, 2 Car. & K. 214. So, under an indictment for highway robbery, the offender may be found guilty only of larceny. 1 Hale P. C. 534, 535. If the prisoner be indicted for stealing in a dwelling-house and putting in fear, he may be convicted of simple larceny. 2 Leach, 671. Or if he be indicted for horse stealing, he may be convicted of simple larceny. Russ. & Ry. C. C. 406. On an indictment for an assault with intent to kill and murder, the jury found the accused guilty of being accessory before the fact of an assault with intent to kill, and judgment was arrested, because that offence was not necessarily included in the indictment. *State v. Scannel*, 39 Me. 68. A conviction for a less offence under an indictment for a greater may be sustained when to convict of the greater offence the prosecutor must prove every fact necessary to constitute the smaller offence. *Prinderville v. People*, 42 Ill. 217. See, to the same effect, *Commonwealth v. Garland*, 3 Metc. (Ky.) 478; *Johnson v. State*, 14 Geo. 55; *State v. Shoemaker*, 7 Mo. 177; *State v. Upchurch*, 9 Ired. 454.

² *Stewart v. State*, 5 Ohio, 242.

³ *State v. Stedman*, 7 Porter, 495; *State v. Gaffney*, Rice, 431; *Commonwealth v. Drum*, 19 Pick. 479.

⁴ *Commonwealth v. Gable*, 7 Serg. & R. 423.

⁵ 2 Rev. St. 702.

⁶ 3 Hill, 92.

ferior offence on an indictment for a superior one. Hence, that under an indictment for producing an abortion of a quick child, which by the Revised Statutes is a felony, the prisoner may be convicted, though it turns out the child was not quick, and the offence was therefore a mere misdemeanor.

Conviction of a lower degree than that charged can only be had where the indictment avers the facts with sufficient particularity to constitute the lower degree of the crime. The provision means only that there is no legal objection to conviction from the fact that the crime is divided into degrees.¹

On the trial of an indictment for murder, the accused cannot be convicted of simple assault and battery, though he may be of manslaughter. Manslaughter and murder are different degrees of the offence of homicide, and hence a conviction for manslaughter on an indictment for murder is authorized by the statute. But assault and battery is not any degree of homicide.²

In an indictment for burglary, where a felonious taking of goods is also charged, the prisoner may be acquitted of the breaking and entering, and may be convicted of the simple larceny.³

§ 431. In *Massachusetts* it is enacted, that whenever any person indicted for a felony shall on the trial be acquitted by verdict of part of the offence charged in the indictment, and convicted of the residue thereof, such verdict may be received and recorded by the court; and thereupon the person indicted shall be adjudged guilty of the offence, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly.⁴ Under this section of the statute, it has been decided that the prisoner, under an indictment for a rape committed on his own daughter, may be acquitted of the rape and convicted of incest.⁵ So, where one is indicted for a rape, he may be found guilty of an assault with intent to commit a

¹ *Dedieu v. People*, 22 N. Y. 178.

² *Burns v. People*, 1 Park. Cr. 182.

³ *People v. Snyder*, 2 Park. Cr. 23.

⁴ Rev. Stat. c. 173, § 11.

⁵ *Commonwealth v. Goodhue*, 2 Met. 193.

rape;¹ or on an indictment for manslaughter, of assault and battery.²

In *Commonwealth v. Simpson*³ the court were of opinion that the two offences of larceny and embezzlement were so far distinct in their character, that under an indictment charging merely a larceny, evidence of embezzlement was not sufficient to authorize a conviction; and that in cases of embezzlement, the proper mode was to allege sufficient matter in the indictment to apprise the defendant that the charge was for embezzlement.⁴

§ 482. Addition to a general verdict of matter having no connection therewith, or beyond the province of the jury, will be rejected as surplusage. Thus, in a prosecution of a party for administering drugs to a woman then pregnant with child, with intent to produce a miscarriage, the jury found the defendant guilty, and fixed his term of imprisonment in the penitentiary, "together with a fine of one hundred dollars." The jury were not authorized under the law to fix any fine, yet the attempt thus to do so did not vitiate the verdict; that

¹ *Commonwealth v. Cooper*, 15 Mass. 187.

² *Commonwealth v. Drum*, 19 Pick. 479.

³ 9 Met. 138.

⁴ In some of our States in indictments for murder the jury are required to specify in their verdict the degree of murder of which they find the prisoner guilty. Thus, in Ohio, where a person was charged in the language of the statute with murder in the first degree, a general verdict "that the defendant is guilty in manner and form as he stands charged in said indictment," was held to be an insufficient verdict under their statute. *Dick v. State*, 3 Ohio St. 89. Though this would in other places be a good general verdict, where the common law rules have not been altered by statute. *Kennedy v. People*, 39 N. Y. 245. Under a similar statute in Tennessee, a like verdict was held insufficient. *Kirby v. State*, 7 Yerg. 259. So in California. Penal Code, § 1157. In Illinois the common law rule prevails, that the jury may acquit of the higher offence charged, and convict of the lesser which is included in the higher, although there be no count in the indictment charging the lesser offence. *Carpenter v. People*, 4 Scam. 197. A general verdict of "guilty" is sufficient without specifying of what offence, either by description, by reference to the indictment, or otherwise. It is understood to mean guilty of the offence charged in the indictment. *Davis v. People*, 50 Ill. 200. Where the indictment charged the defendant with murder generally, without appropriate allegations fixing the degree of murder, and the verdict of the jury was simply, "We the jury find the defendant guilty," it was held a new trial should be awarded, because the jury did not determine whether the accused was guilty of murder in the first or second degree. *Isbell v. State*, 31 Tex. 138.

portion of it was rejected as surplusage.¹ So of an addition to a general verdict of a recommendation to mercy.²

In an action to recover damages for deceit in the sale of a chattel, the jury returned a verdict for a certain sum, adding the words: "believing the plaintiff to have been misled by the catalogue." It was held that the verdict was general, and that the court might direct the added words to be disregarded in recording the verdict.³ And a verdict on a writ of dower finding the value of the lands where the husband did not die seised will be considered surplusage.⁴

The mistake of the jury in prefixing the original title of the case to the verdict, where the original title to the case was wrong, but had been subsequently corrected by the court, before the verdict, was held to be immaterial, and that such mistake might be treated as mere surplusage.⁵

§ 433. Verdict where several are indicted. — If several be jointly indicted for an offence which in its nature may be committed by one person or several, the indictment is consid-

¹ *Armstrong v. People*, 37 Ill. 459. See *Wells v. Garland*, 2 Va. Cas. 471.

² *State v. O'Brien*, 22 La. An. 27. In the *American Law Review*, vol. 9, p. 178, is an account of a singular verdict of this character, taken from the *Pall Mall Gazette*. It is thus quoted: "The celebrated verdict of 'not guilty, but don't do it again,' has been rivalled, if not surpassed, by the finding of a jury the other day at the Nottingham assizes. The case was an indictment for obtaining money under false pretences; the prisoner, William Cowlenshaw, being charged with falsely pretending that he was a certified schoolmaster. It was proved that he had answered in person an advertisement for a certified schoolmaster for certain schools at Bingham; that he had stated his name to be Woodward, and said that he had been trained at Saltley, and had passed ninety-six scholars. . . . After communication with the education department, it turned out that the name of Samuel Woodward, assumed by the prisoner, was that of a schoolmaster since dead, under whom he had served as an assistant. The case having been summed up to them, the jury after consideration said: 'We find he has done wrong, but we recommend him to mercy.' The judge wished to know whether they found the prisoner guilty or not guilty, and the jury were understood to say that they found him 'not guilty, but recommend him to mercy.' This verdict was, it appears, received with 'some laughter,' and his lordship having explained to the jury that a recommendation to mercy was an unnecessary appendage to an acquittal, they retired from the court to consider this explanation. In an incredibly short time they had mastered it, and returned into court with a verdict of not guilty."

³ *Gover v. Turner*, 28 Md. 600. See *Duane v. Simmons*, 4 Yeates, 441.

⁴ *Lineweaver v. Stoeve*, 17 Serg. & R. 297.

⁵ *People v. Ah Kim*, 34 Cal. 189.

ered in law as a several indictment against each, and one may be convicted on it and the rest acquitted.¹

So, where the jury have agreed as to one or more of several prisoners, their verdict as to them ought to be received, though they cannot agree as to the rest, and are from necessity discharged by the court.²

Though two or more persons jointly indicted cannot be convicted of a joint offence, where the offences are proved to have been separate, yet they may be convicted as if separate indictments had been proved.³

And where two defendants are charged, one as principal in the first, and the other in the second degree, as being present aiding and abetting, the latter may be found guilty, though the former is acquitted.⁴

In a case where four defendants were jointly indicted for misdemeanor, the proof on the trial showed that they were partners in a tallow factory which was a nuisance, and the jury returned as their verdict: "We the jury find the defendants guilty and assess the punishment at two hundred and fifty dollars fine." It was held that this was evidently a joint verdict against the partnership, and being a joint verdict it was erroneous, as there can be no partnership in crime.⁵

§ 434. In cases of riot or conspiracy there must be a certain number of defendants to constitute the offence: a riot cannot be committed at common law by less than three persons, or a conspiracy by less than two. And therefore if several be

¹ *Rex v. Taggart*, 1 Car. & P. 201; 2 Hawk. c. 47, § 8; 3 T. R. 105.

² *Commonwealth v. Cook*, 6 Serg. & R. 577; *Commonwealth v. Wood*, 12 Mass. 313.

³ *Chatterton v. People*, 15 Abb. Pr. 147; Whart. Cr. 2.

⁴ 1 Leach, 360. If on an indictment for a nuisance against three persons, the jury find one guilty, and say nothing as to the others, judgment may be rendered against the one found guilty. *Bloomhuff v. State*, 8 Blackf. 205.

⁵ *Allen v. State*, 34 Tex. 230. See *State v. Gay*, 10 Mo. 441; *Fife v. Commonwealth*, 29 Penn. St. 429; *Curd v. Commonwealth*, 14 B. Mon. 310. Where an indictment charges several with a joint offence, any of them alone may be found guilty; but they cannot be found guilty separately of separate parts of the charge. *Hall v. State*, 8 Ind. 439. When several are indicted for a misdemeanor and issue is joined on a plea of misnomer filed by one, and the others plead not guilty, it is not necessary that a separate jury should pass upon the plea of misnomer; the whole of the issues may be presented to the same jury, and a general finding of guilty will justify a judgment. *Schram v. People*, 29 Ill. 162.

indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it be charged in the indictment, and proved, that they committed the riot together with some other person not tried on that indictment.¹ So, if upon an indictment for conspiracy the jury acquit all the defendants but one, they must acquit that one also, however criminal they may think him, unless it be charged in the indictment, and proved, that he conspired with some other person not tried upon that indictment.² But where one is indicted for a conspiracy, or two for a riot with others, the conviction will be valid, though the others never come in to be tried, or die before the time of trial.³ A conspiracy is in its nature a joint offence; less than two persons cannot be accused of it, and where the offence is charged the court cannot award a separate trial.⁴

PART II. SPECIAL VERDICT.

§ 435. *Definition of.* — A special verdict is so called because some matter of fact is thereby found specially. The design of a special verdict is to submit some questions of law, which arise upon the matter of fact found specially, to the consideration of the court.⁵

¹ 2 Hawk. c. 47, § 8; *United States v. Cole*, 5 McLean, 513; *State v. Brooks*, 1 Hill (S. C.), 361; *State v. Eagan*, 10 La. An. 698.

² *Ibid.*

³ Poph. 641.

⁴ *Commonwealth v. Manson*, 2 Ashm. 31. Where two only were charged with a conspiracy, the acquittal of one of them is the acquittal of the other. *State v. Tom*, 2 Dev. 569. But when three were engaged in a conspiracy and one died before trial, and one was acquitted, it was held that the third, notwithstanding, might be tried and convicted. *People v. Olcott*, 2 Johns. Cas. 301. In Illinois, if two or more persons, being together, do an unlawful act with force and violence, it constitutes a riot. *Dougherty v. People*, 5 Ill. 179. So in Georgia. *Prince v. State*, 30 Geo. 27. Where there is an indictment against three for a riot and a verdict of guilty as to one, and not guilty as to the others, a judgment cannot be rendered on the verdict against him found guilty. *Turpin v. State*, 4 Blackf. 72. An indictment against three for a riot is supported on the separate trial of one by proof of a riot in which he and any two other persons joined. *Commonwealth v. Berry*, 5 Gray, 93. On an indictment for riot, and a riotous assault and battery, by four persons, one of them may be convicted of assault and battery, and the others acquitted of the whole. *Shouse v. Commonwealth*, 5 Penn. St. 73.

⁵ *Bac. Abr. Verdict (D)*. No particular form of words is necessary to be followed with technical exactness in drawing up a special verdict. 1 Chitt. C. L. 643.

It is said that the court cannot refuse to receive a special verdict provided the matter specially found be pertinent to the issue, for that the jury have a right to find such verdict in every case which appears to them doubtful.¹ In many instances where a general verdict is found the jury are also required in addition thereto to find specially some matter of fact. This is the case on penalties for breaches of a bond, or for violations of statutes, where some amount is required to be specially found.² By statute 39 & 40 Geo. III. c. 94, it is provided that where it shall be in evidence that a person charged with treason, murder, or felony, was insane at the commission of the offence, the jury shall be required to find that fact specially, and to declare whether such person was acquitted on account of insanity. We have adopted this provision in many of our States.³

§ 436. All the essential facts must be found by a special verdict, in order to enable the court to give a judgment of law upon the matter in issue. Nothing is to be taken by the court by implication or intendment; what is not found is supposed not to exist. The very idea of a special verdict imports a full finding of the necessary facts involved, and when any are omitted, it must be defective.⁴ So, in an action on a bond, the special verdict found that the action was "brought against (the sheriff) and a recovery had against him," &c., but did not find that the suit was for the goods mentioned in the bond; and on this account it was held fatally defective.⁵ From a special verdict which finds that there was an entry upon land by a certain grantee of a rent-charge upon it, and a holding

¹ 1 Co. Litt. 228; 9 Rep. 12. By New York Rev. Statutes, "No jury shall in any case be compelled to give a general verdict, so that they find a special verdict showing the facts respecting which issue is joined, and therein require the judgment of the court upon such facts." 2 R. S. 421. So in California, except upon an indictment for libel. Penal Code, § 1150.

² *Westbrook v. Van Auken*, 2 South. 478.

³ It is so provided in Pennsylvania. *Dunlop's Laws* p. 674. In California there is a special provision made for trying the sanity of a person accused of crime. Penal Code, § 1368.

⁴ *Rex v. Plummer*, 12 Mod. 628; *Lodge v. Jennings*, Gilb. Eq. 255; *People v. Turnpike Co.* 47 N. Y. 596; *Pittsburgh, &c. R. R. Co. v. Evans*, 53 Penn. St. 250; *State v. Custer*, 65 N. C. 339; *Thayer v. Ins. Co.* 24 Penn. St. 560; *State v. Wallace*, 3 Ired. 195; *Erwin v. Clark*, 13 Mich. 10.

⁵ *Loew v. Stocker*, 61 Penn. St. 347.

by him and those claiming under him for forty-three years, the court cannot infer that the original entry was under the right of entry given by the deed for non-payment of rent, or that the parties held adversely.¹

§ 437. Facts cannot be supplied by reference to the record to aid a defective special verdict. In rendering judgment upon a special verdict the court must be confined to the verdict, and cannot refer to other facts upon the record for the purpose of aiding the verdict.² So, it is held that a special verdict must positively state the facts themselves, and the court cannot supply a defect in the statement made by the jury on the record by any intendment or implication whatever; and this is so, although the circumstances stated may be sufficient to warrant an inference or presumption of the existence of the matter omitted.³ So, where the plaintiff claimed title under the husband, and the defendant under the community, and the evidence showed that the consideration paid for the land in controversy consisted of a slave and a yoke of oxen of a certain value respectively, the jury found a special verdict, that the land was paid for by a slave who was the separate property of the wife, and a yoke of oxen the property of the community, but without finding their respective value. It was held that the court had no power to look at the testimony, though not conflicting, to fix the value and make up the decree, but that there must be a new trial.⁴ And where the issue submitted to the jury was, whether the defendant had, after he was discharged from all liability on the note on which he was sued by becoming a bankrupt, promised to pay the amount of it as alleged by the plaintiff, it was held that a verdict that such promise had been made by him would not authorize the court to render a judgment upon it against the defendant.⁵

§ 438. A Special Verdict must contain Fact, and not

¹ *Turner v. Smith*, 18 Gratt. 831.

² *Kuhlman v. Medlinka*, 29 Tex. 385; *Clay v. State*, 43 Ala. 350; *Bolling v. Mayor*, 3 Rand. 536; *Eisemann v. Swan*, 6 Bosw. (N. Y.) 668.

³ *Jones v. State*, 2 Swan, 399.

⁴ *Claiborne v. Tanner*, 18 Tex. 68. See *Wallingford v. Dunlap*, 14 Penn. St. 31.

⁵ *Carson v. Osborn*, 10 B. Mon. 155.

Evidence of Facts. — It will not do to state what is mostly *prima facie* evidence of such facts; the facts themselves must be found, without leaving it to the court to draw from those found by way of presumption or inference the principal facts necessary.¹

So, where in an action on a note payable in stock the defendant pleaded payment, and the jury found specially that he had tendered the stock, &c., it was held that the verdict was invalid, and that no valid judgment could be rendered thereon.² This requisite of a special verdict was well illustrated in an early case. The matter in issue, whether J. S. had resigned a benefice to a bishop. The jury found an instrument under the seal of the bishop, upon which was an indorsement that J. S. did resign the benefice to him, and that he accepted the resignation. The verdict was held bad, because it did not find expressly that J. S. had resigned the benefice.³

§ 439. **Effect of Special Finding on General Verdict.** — It often happens that a jury, having found a general verdict, add thereto a special finding of facts, either as addition, or as indicating the basis on which the general verdict was made. It is very essential that there should be no conflict between the two findings — between the general verdict and the matter specially found. Should there be any conflict or inconsistency it becomes an important inquiry as to which should control, the general or the special finding. There may be some occasions when an apparent inconsistency may be immaterial, and the special matter can be disregarded as surplusage, when the

¹ *Kinsley v. Coyle*, 58 Penn. St. 451; *Blake v. Davis*, 20 Ohio, 231; *Barnes v. Williams*, 11 Wheat. 415; *Sisson v. Barrett*, 2 N. Y. 406; *Suydam v. Williamson*, 20 How. (U. S.) 427; *Hill v. Covell*, 1 Comst. 522; *Langley v. Warner*, 3 *Ibid.* 327; *Fryer v. Roe*, 22 Eng. L. & Eq. 440.

² *Barker v. Brink*, 5 Clarke, 481. In ejectment, where it became necessary to prove livery of seisin, a new trial was granted because the verdict did not find the fact definitely, but only that there was a memorandum of it indorsed upon the deed. *McLean v. Copper*, 3 Call (Va.), 367.

³ *Smith v. Foaves*, Noy, 147. The Penal Code of California, § 1456, has provided for a new trial in case the jury find merely evidence and not facts in a special verdict. It says: "If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact, from the evidence, as established to their satisfaction, the court must order a new trial."

court may properly reject it; but it not rarely happens that the jury are *required* to make a special finding, either by express direction of the court,¹ or at the instance of the parties, and in such a case the special finding becomes part of the verdict, and cannot be rejected. What, then, is to be done in case the two are irreconcilable? Suppose a statute makes it a felony, an indictable offence, to steal the sum of fifty dollars, and that on an indictment for such a felony, the jury bring in a verdict of guilty, to wit, stealing the sum of *thirty-five* dollars; shall the latter part of the verdict be disregarded and the verdict of guilty stand? Manifestly not; for the jury expressly find a fact, and the conclusion of guilty is drawn from it; hence, if the premises be erroneous, the conclusion cannot be right. It is, therefore, laid down as a rule, that special findings must control the general in case of inconsistency.²

So, if the jury, after finding the fact specially, take upon themselves to draw a conclusion not warranted by law, the court ought not, in giving judgment, to pay any regard to the conclusion of the jury, because they ought not to have drawn such a conclusion.³ So, when there is a general verdict and also a special finding in answer to interrogatories, and the special finding shows that the general is for too much, the former will control the latter, and judgment should be rendered for the amount shown by the special finding.⁴ The jury cannot be required to find specially upon any question, the answer to which would in no way affect a general verdict.⁵

§ 440. **Power of the Court over a Special Verdict.** — The court should be required, in case of a special verdict, to do nothing more than apply the conclusion of law to the fact or facts found; and if there be not sufficient found to enable it

¹ It is not improper, upon a jury trial, for the presiding judge to require the jury to find a special verdict upon a distinct issue of fact made by the evidence. *Spaulding v. Robbins*, 42 Vt. 90.

² *Adamson v. Rose*, 30 Ind. 380; *Ridgeway v. Dearing*, 42 Ind. 157; *Leese v. Clark*, 20 Cal. 387; *Amidon v. Gaff*, 24 Ind. 128; *Wisler v. Holderman*, 40 Ibid. 106; *Nicholls v. Weaver*, 7 Kans. 373; *Lamb v. Society*, 20 Iowa, 505.

³ *Priddle's case*, 11 Rep. 10.

⁴ *Skillen v. Jones*, 44 Ind. 136.

⁵ *Shehan v. Barry*, 27 Mich. 217.

to do so, it should set aside the verdict. So, if the verdict, whether general or special, is imperfect by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages, the court will award a *venire de novo*.¹

The court can reject surplusage in a special verdict which does not show clearly that the jury reasoned incorrectly or from false premises.² So, it was held that if the issue in an assize be whether there is a seisin, and the jury, after finding some fact specially, conclude with saying that this amounts to a seisin, the court, without paying any regard to the conclusion of the jury, will judge whether the fact found do amount to a seisin.³

The court, however, cannot alter the finding of fact, or the substance of the verdict, either to add or detract therefrom.⁴ Thus, where the answers to interrogatories addressed to a jury are deemed equivocal, or not fully responsive to the questions asked, it is the province of either party to demand that the verdict shall not be received, and that the jury shall be kept together, and directed to answer the questions fully; but after the verdict has been received by the court without objection, and the jury discharged, it is error for the court to strike out one portion of the finding pertinent to the case, and render judgment on the residue.⁵

§ 441. *Special Verdict in Criminal Cases.* — Though a special verdict in a criminal case is not at present common, there is no reason why the jury cannot render such a verdict. For the jury may find a special verdict in criminal as well as in civil actions; and it is held by Hawkins that they may do so even in capital cases.⁶

¹ *Ld. Raym.* 1521; *Rex v. Woodfall*, 5 *Burr.* 2669; *Goodtitle v. Jones*, 7 *T. R.* 52; *Hick v. Keats*, 4 *Barn. & C.* 69.

² *Gregory v. Frothingham*, 1 *Nev.* 253.

³ *Bro. Verd.* pl. 41.

⁴ A special verdict cannot be amended in matters of fact, yet the court may amend a mere error in form, even in capital cases, when there are any notes or minutes by which it can be amended. Where the alteration is merely to fulfil the evident intention of the jury the court will in all cases allow it to be effected. 1 *Chitt. Cr. L.* 645.

⁵ *Noakes v. Morey*, 30 *Ind.* 103.

⁶ 2 *Hawk. c.* 47, § 3.

"A jury have a right in all criminal cases to find a special verdict. Such verdict must state positively the facts themselves, and not merely the evidence adduced to prove them; and all the facts necessary to enable the court to give judgment must be found, for the court cannot supply by any intendment or implication any defect in the statement."¹

In the United States special verdicts are rarely found; though this part of the English law is known with us and is sometimes practised.²

In *Commonwealth v. Chatham*,³ it was held that a jury has a right in all cases whatever, whether capital or otherwise, to find a special verdict by which the facts are put on record, and the law is submitted to the judges. It is sufficient if the jury find all the substantial requisites of the charge without following the technical language used in the indictment; and it is not necessary that, after stating the facts, they should draw any legal conclusion.

§ 442. The facts must be strictly found; for in a civil case the verdict might be aided by construction in merely formal matter; but in a criminal case, where the jury take upon them to find the facts constituting an offence, they must fully and clearly find every fact essential to permit the court to pass sentence.⁴

Therefore, where the indictment set forth that the defendant discharged a gun against the deceased, and thereby gave him a mortal wound, and the jury only stated that he discharged a gun and thereby killed him, omitting that it was against him, it was adjudged that the court could not give any judgment against the prisoner.⁵ So, where the jury on an indictment against an officer for taking unlawful fees, found that he took more than his legal fees, but not corruptly, such finding was held tantamount to a verdict of acquittal.⁶

¹ 1 Chitt. C. L. 645.

² Bishop, *Crim. Proced.* § 834; *Peterson v. U. S.* 2 Wash. C. C. 36; *State v. Duncan*, 2 McCord, 129.

³ 50 Penn. St. 181.

⁴ 2 East P. C. 708.

⁵ Kelyng, 60.

⁶ *State v. Bright*, 2 Car. Law Repos. 634.

PART III. SUFFICIENCY OF THE VERDICT.

§ 443. **Requirements.** — In the previous part of this chapter we have considered the verdict more particularly as to its form — as to its being a general or special verdict. It is now intended to consider more specially the requirements of the verdict; to consider it as responsive to the issues involved in the case, as a sufficient finding of the matter committed to the deliberation of the jury. In this respect a verdict is liable to three imperfections. First, it may fail to find the entire issue required; secondly, it may find upon matter which is not in issue; and thirdly, it may vary from the issue.

§ 444. **Where less than the issue is found, a verdict is bad, because the jury have failed in their duty, which was to find all that was in issue.**¹ Thus, in an old case, where, in an information for intruding into a messuage, on a hundred acres of land, issue was joined upon the plea of not guilty; the jurors found for the plaintiff as to the land, but were silent as to the messuage; and for this cause the verdict was held to be bad.² So, in an indictment for privately conveying ducats into the prosecutor's pocket, with the intent to charge him with a robbery, the jury found the defendant guilty of the fact, but were silent as to the intent, no judgment could be given, the verdict being incomplete.³

In an action of trespass the plaintiff declared for the breaking of his close, for the beating of his servant, and for the carrying away of his goods. The defendant pleaded not guilty and issue was joined on this plea. The jury found the defendant guilty of breaking the close, but were silent as to the beating of the servant and the carrying away of the goods. The verdict was held upon a motion in arrest of judgment to be bad, because it did not find all that was in issue, and a *venire facias de novo* was awarded.⁴

When a verdict decisive of the case is found on one or more

¹ *Patterson v. U. S.* 2 Wheat. 221; *French v. Hanchett*, 12 Pick. 15; *Smith v. Raymond*, 1 Day, 189; *Schmitz v. Lauferty*, 29 Ind. 400; *Lewis v. Farrish*, 2 Miss. 547; *People v. Doesbury*, 17 Mich. 135; *Phillips v. Hill*, 3 Tex. 397.

² 1 Inst. 227.

³ *Rex v. Simons*, Sayer, 36.

⁴ *Rosse's case*, 2 Leon. 94.

of several issues, and the jury cannot agree as to one other issue, the party in whose favor the verdict is found may waive the other issue, or consent that a verdict be entered on it against him.¹

In an action to recover goods lost while in charge of a railroad company, when the jury fail to find whether the loss occurred before or after the arrival of the goods at the warehouse of the company, and there is no proof of want of ordinary care, a new trial must be ordered.²

Where the pleadings present two independent issues, both of which must be found for the plaintiff before he could have judgment, and the jury found one in his favor and failed to agree upon the other, it was held that the verdict might be recorded as to the issue found, leaving only the other issue to be tried by another jury.³

§ 445. **On Matter not in Issue.** — A verdict is not necessarily bad when it finds upon matter not in issue; for where the finding on the superfluous matter can be separated from that which is in issue, and the latter is definitely found, the court can reject as surplusage what is found over and above the essential matter.⁴ Thus, if the matter in issue be, whether there are assets, and the jury find that there are assets *beyond the seas*, the verdict is nevertheless good; for the court will, in giving judgment, reject the words *beyond the seas* as surplusage.⁵

So, in an action of assumpsit the jury found a verdict for the plaintiff, and after assessing damages to the amount of thirty pounds, added the following words, "the damages to be paid in dyeing, if by law they may be so paid." These words being omitted in the judgment, a writ of error was

¹ Sutton v. Dana, 1 Met. 383.

² Jackson v. R. R. Co. 23 Cal. 268.

³ Wood v. Wood, 52 N. H. 422. See Shapleigh v. Abbott, 41 Me. 173.

⁴ The finding of facts not necessarily involved will not vitiate a verdict when enough is found to decide the issue. Tuley v. Mawzey, 4 B. Mon. 5; 2 Lev. 253; 3 Salk. 376.

⁵ Dowdale's case, Cro. Jac. 55. The verdict, "We find for the plaintiff the debt in the declaration mentioned, which may be discharged by the payment of the sum," &c., is substantially good, — what relates to the debt demanded being regarded as surplusage. Longacre v. State, 2 How. (Miss.) 637; Cropper v. U. S. 1 Morris, 259.

brought, and the omission was assigned for error. The judgment was affirmed; and the court held that the verdict finding for the plaintiff and assessing damages, was a complete verdict, and what was added *as to the manner of paying the damages* was nugatory, and it was properly omitted in the judgment.¹

§ 446. **When Verdict varies from the Issue.** — The most obvious requirement in a verdict is that it shall conform to the issue between the parties, and where it varies or departs from such issue it will be bad. And a verdict which contradicts the facts admitted in the pleadings is to be disregarded;² it must conform to the pleadings actually put in.³

If the issue joined be material, the verdict ought to find the issue either for or against the party tendering it, and on the verdict as found must the judgment be rendered.⁴

A verdict in *detinue* was as follows: "We the jury find the property named in the declaration to be in the plaintiff, and find the value thereof to be \$60." It was held that the judgment should be arrested, the verdict not showing an unlawful detainer of the property.⁵

Where a verdict was given of "guilty of perjury before A. and B., Esqrs., in conjunction," and the indictment being for perjury before A., Esq., the variance was held to be fatal.⁶

So, on a complaint for forcible entry and detainer, a verdict of guilty of unlawful detainer does not respond to the issue.⁷

§ 447. **In actions of ejectment** the rule is laid down in the old cases, that if the verdict is for a less quantity of property than that laid in the declaration, the verdict will be good for so much as found, and the plaintiff may have judgment on the verdict so found, though it varies from the declaration.⁸

¹ Taylor v. Willes, Cro. Car. 219. See Duane v. Simmons, 4 Yeates, 441;

• Ames v. Sloat, Wright, 577; Hunter v. Commonwealth, 2 Serg. & R. 298.

² Groves v. Bailey, 24 Miss. 588; McFerran v. Taylor, 3 Cranch, 280; Foley v. Alkire, 52 Mo. 317; Middleton v. Quigley, 7 Halst. 352.

³ Brown v. Hillegas, 2 Hill (S. C.), 447.

⁴ Holmes v. Wood, 6 Mass. 1.

⁵ Crouch v. Martin, 3 Blackf. 256. See Allison v. Darton, 24 Mo. 343.

⁶ State v. Mayson, Const. Rep. 200.

⁷ Grice v. Ferguson, 1 Stew. 36.

⁸ Ablett v. Skinner, 1 Sid. 229; Brown v. Meredith, 2 Roll. Abr. 703; Burgess v. Purvis, 1 Burr. 326.

The same ruling has been adopted in several instances here. Thus, in *Bowles v. Sharp*¹ it is held the jury may find the defendant guilty as to a part and not guilty as to the residue. The same rule is held in North Carolina,² in Tennessee,³ in Mississippi;⁴ and in the case of *McArthur v. Porter*⁵ the Supreme Court held that in ejectment for a tract of land, where the property sued for is described by metes and bounds, the jury may find a verdict for part of the land, describing it in their verdict. This last case is instructive as showing the manner in which the jury should render a verdict when they find a part only of the land laid in the declaration.⁶

§ 448. The variance of a verdict from the indictment will generally be fatal. It is one of the first principles of criminal law, strictly observed in all courts, that the verdict must conform to the indictment in form and substance. It must find just what is charged, with the accompaniments of time, place, and manner, and all other essential requisites of the indictment. A want of sufficient certainty in setting forth

¹ 4 Bibb, 550; *Little v. Bishop*, 9 B. Mon. 240.

² *Lenoir v. South*, 10 Ired. 237.

³ *Singleton v. Ake*, 3 Humph. 626.

⁴ *McCraven v. McGuire*, 23 Miss. 100.

⁵ 6 Pet. 205.

⁶ The difficulty in such a case is to describe the part found with sufficient certainty so that the claimant can be put in possession. For if a claim be made for a certain number of acres, and the verdict find generally for a part, it will not be possible to determine the exact portion which the sheriff can deliver to the claimant under the verdict. For this reason, in an old case (*Ablett v. Skinner, supra*), where a jury found a defendant guilty as to part only, the reporter subjoined the query: In what manner is the writ of possession in such a case to be executed? And in a case in Pennsylvania (*Borough of Harrisburg v. Crangle*, 3 Watts & S. 460), where the verdict was "for 2 acres, 28 perches, and $\frac{3}{4}$ of a perch, with six cents damages," &c., it being but part of the lot for which the action was brought, it was held incurably bad. The court say: "It is not good unless it carries certainty on its face, or refers to something by which it may be made certain. Here it is neither certain on its face, nor can it be reduced to a certainty; and it is impossible for the court to know for what to render judgment, or for the sheriff to ascertain of what portion of three acres he is to put the plaintiff in possession. There is nothing on or *dehors* the record which indicates the part recovered, or from what part the portion recovered is to be taken. The sheriff would not know where to begin nor where to end; and yet he is required to act at the peril of becoming a trespasser, if he unfortunately or by mistake delivered more to the plaintiffs than had been recovered. The verdict is therefore incurably uncertain." See, to the same effect, *Crommalin v. Minter*, 9 Ala. 594.

either the person, the time, the place, or the offence, will be available on arrest of judgment.¹ It is held "the form of the verdict must be such that all the circumstances constituting the offence must be found in order to enable the court to give judgment; for the court cannot supply a defect in the statement made by the jury on the record by any intendment or implication whatsoever."² Thus, where the indictment was for "delivering, selling, exchanging, and giving spirituous liquors to a certain slave of Jacob F. Mintzing, named Sam," and the verdict was "guilty of giving and delivering liquor to a slave," it was held that no judgment could be given on such verdict.³ So, where the proof was that the accused shot "some person by the name of Rathburn," it could not sustain a conviction under an indictment charging that he shot "William A. Rathburn."⁴

The true principle is well stated by the court in New York, holding: "A finding of the jury which is neither in the language of the statute, nor in the language of either count of the indictment, is insufficient."⁵

PART IV. A SEALED VERDICT.

§ 449. When rendered. — In civil cases, and in criminal cases of misdemeanor, it is frequently the practice of the court to allow the jury to find a privy verdict, seal it, and deliver it to the clerk or officer in charge, and then separate. This is generally known as a sealed verdict at the present time; but it was formerly styled a privy verdict.⁶

In another section of this chapter it was shown that a privy verdict could not be given in a case of felony. It was a rule that wherever the personal appearance of the defendant was not necessary the jury might give a privy verdict.⁷ So, in an information for a misdemeanor, the jury gave a privy verdict. The verdict afterwards given in open court was upon this account objected to; but it was held to be good.⁸

¹ 4 Bl. Com. 375.

² O'Leary v. People, 17 How. Pr. 316.

³ State v. Lohmdn, 3 Hill (S. C.), 67.

⁴ Hardin v. State, 26 Tex. 113.

⁵ Nelson v. People, 23 N. Y. 293.

⁶ See § 407.

⁷ Rex v. Ladsingham, 1 Ventr. 97.

⁸ Raym. 193.

But a direction of the court to the jury to seal up their verdict and separate, does not dispense with their presence when received and published in open court.¹

The jury are required to be present when the verdict is announced, unless their presence is dispensed with by consent of the parties. So, where both parties to a suit consented that the jury should "seal their verdict, when agreed upon, and deliver the same to the clerk, and disperse to their homes and not return," neither could object that the verdict was received and recorded without being delivered by the jury in open court.²

But if the parties agree that the jury may deliver a sealed verdict, it does not take away the right of either of them to a public verdict, and any of the jurors may dissent from the verdict to which he had before agreed.³

Where a judge directs a jury to bring in a sealed verdict, and gives them permission to separate after agreeing on the same, if no objection is made by the parties to such direction they will be deemed to have assented to it.⁴ And where by agreement the jury seal their verdict and separate, and the parties afterwards agree to receive such sealed verdict from eleven of the jurors, the verdict will not be set aside on that account.⁵

There is a solemn injunction on jurors to keep the result of a sealed verdict secret until it is announced in court; it is reprehensible conduct in any juror to disclose its nature before it has been announced.⁶

§ 450. Time of returning a Sealed Verdict. — The jury are directed that they may separate, after finding a verdict

¹ *Rigg v. Cook*, 4 Giln. 336. A sealed verdict is no part of the record, and does not become so by filing, — the finding in open court being the only verdict that is admitted of record. *Reese v. Stillé*, 38 Penn. St. 138.

² *Burlingame v. Burlingame*, 16 Wis. 285; *Paige v. O'Neal*, 12 Cal. 483.

³ *Root v. Sherwood*, 6 Johns. 68.

⁴ *Douglass v. Tousey*, 2 Wend. 352.

⁵ *Woods v. Commissioners*, 1 Morris, 441.

⁶ *Ingersoll v. Truebody*, 40 Cal. 603. The foreman of a jury was ordered to return the verdict sealed up to the clerk; the jury agreed after adjournment of the court. It was held that the accidental unsealing of the instrument, when delivered by the foreman the next morning, did not vitiate it. *Bass v. Hanson*, 9 Iowa, 563.

and delivering it sealed, until the court meets on the adjourned day, usually the next morning, when the jury are required to be present when the verdict is announced. They cannot deliver the verdict at another term; it must be at that term of the court.¹ Legally a term constitutes but one day; and adjournments are merely for rest and refreshment; so that, though the jury are permitted to retire to their homes, they are, nevertheless, under the direction and authority of the court while its term lasts.

But the question is sometimes presented, whether the court can receive from the jury the verdict before the time to which the court is adjourned, and discharge the jury. It would seem that it would be irregular to do so, because contrary to agreement; certainly, in a criminal case, where the prisoner should be present, it would be irregular. The question has come up in two instances in the courts of Illinois and Wisconsin. In *City of Chicago v. Rogers*² the jury were authorized, with the consent of counsel, to return a sealed verdict, the court having adjourned; but before the judge had left the court room or his seat on the bench, he was informed by the officer having charge of the jury that they had agreed upon a verdict; thereupon they were brought in and delivered an open verdict in the presence of the judge, the clerk, and plaintiff's attorney, but in the absence of defendant's counsel. This was held error; for the agreement was, that the verdict should be sealed, and it was violated by receiving an open verdict; and as it was shown the court had adjourned, it had no power to receive any verdict until it was again convened.

In *Barrett v. State*³ the defendant was indicted for rape. The case was given to the jury about three o'clock in the afternoon. At half-past six the same evening the court adjourned until the next day at half-past eight o'clock in the morning. At eleven o'clock of the evening on which the court was adjourned, the judge was informed that the jury had agreed upon a verdict, and desired to render it. The judge repaired to the court room, and in the presence of the

¹ But where the parties agree that after finding a sealed verdict the jury may separate, and not again return into court, the verdict may be opened at another term of the court. *Pierce v. Hasbrouck*, 49 Ill. 23.

² 61 Ill. 188.

³ 1 Wis. 175.

defendant, the jury, officers of the court, and bystanders, received the verdict.

The jury were not afterwards called to affirm or disaffirm their verdict. It was objected that this being a privy verdict, it could not have been received until the time the court was adjourned, and that it was irregular to receive the verdict during the absence of defendant's counsel. The court decided that the verdict under the circumstances was not in any sense a privy verdict; that an adjournment in this manner did not suspend the functions of the court; the general rule being that the term is to be considered as one day. As to the point of the absence of prisoner's counsel, the court held it did not appear but that his counsel had notice that the jury had agreed, and that the verdict would be received; and if the mere absence of counsel could be assigned for error, then it would be in the power of counsel to prevent the reception of a verdict altogether.¹

§ 451. **Sealed Verdict in Criminal Cases.** — As a rule, a sealed verdict is not permitted in cases above misdemeanors; this was the rule laid down in the old cases.² It is, however, now regulated to a great extent by statute in our States. It has been held that even in cases of felony a sealed verdict can be rendered by consent, and the jury may be allowed to separate. In Illinois the statute provides: "That in any cases of misdemeanor only, if the prosecutor for the people and the person on trial by himself or counsel shall agree, which agreement shall be entered upon the minutes of the court, to dispense with the attendance of an officer upon the jury, or that the jury when they have agreed upon their verdict may write and seal the same, and after delivering the same to the clerk may separate, it shall be lawful for the

¹ See, to the same point, *Matter of Green*, 16 Ill. 234; *Sutcliffe v. State*, 18 Ohio, 469.

² 1 Chitt. C. L. 636; 3 Bl. Com. 337. In Maine, in any criminal case except capital cases and cases where the punishment is imprisonment for life, any presiding judge may, at his discretion, authorize a jury, when they agree during an adjournment of the court, to seal up their verdict and separate, and have it opened, read, and affirmed when the court comes in, with the same effect as if pronounced orally. *Anonymous*, 63 Me. 590. In Pennsylvania in all cases except those of homicide the jury may seal their verdict. *Commonwealth v. Boyle*, 9 Phil. 592.

court to carry into effect such agreement, and receive any such verdict so delivered to the clerk as the lawful verdict of any such jury." In *Reins v. People*,¹ where the defendant was indicted for manslaughter, it was agreed by the consent of parties that the jury after delivering a sealed verdict might separate if they chose, and return with their verdict in open court the following day. It was objected, on error, that the statute prohibited an agreement in such a case to receive a sealed verdict. The court held that it was competent, notwithstanding the statute, for the parties to make the stipulation. For the statute contemplated an entire discharge of the jury; they would be *functus officio*; whereas in this case the body was still kept in existence. "It is enjoined on the jury, by the terms of the order of court, that after sealing their verdict and separating for the night, they should meet the court on the next morning, and deliver their verdict in due form in open court. Being so, the accused could by no possibility lose any advantage, or be deprived of the privilege of examining the jury by the poll, which the law gave him."² In a late case in California³ it was held that an order of the court in a criminal case, made by consent of the defendant, authorizing the sheriff to receive from the jury a sealed verdict, and upon its receipt to allow the jury to separate until the session of court the following morning, is not an error of which the defendant can complain. This was a case where the defendant was indicted for a rape.

PART V. RECEPTION OF THE VERDICT.

§ 452. In Open Court. — When the jury have agreed upon their verdict they are conducted into the presence of the court, when the result is announced by their foreman.⁴ The procedure

¹ 30 Ill. 256. See *Chicago v. Langlass*, 66 Ill. 361.

² This decision would not be generally accepted in capital cases where a prisoner is on trial for his life. In *State v. Populus*, 12 La. An. 710, it was held that the jury cannot be permitted to separate even by consent, after the evidence has been closed. It is held that in capital cases the prisoner should not be permitted to waive any of his rights. *Cancemi v. People*, 18 N. Y. 128.

³ *People v. Kelly*, 46 Cal. 356.

⁴ A written verdict in a criminal case is irregular and unofficial, and may be rejected, and a verdict in the ordinary form may then be taken. *Lord v. State*, 16 N. H. 325; *State v. Walters*, 18 La. An. 648. But a statute exists in Ohio requiring the verdict to be given in writing. *Hardy v. State*, 19 Ohio N. S. 579.

in a criminal case, according to the English practice, is thus described: "When the jury have come to a unanimous determination with respect to their verdict, they return to the box to deliver it. The clerk then calls them over by their names, and asks them whether they agree on their verdict, to which they reply in the affirmative. He then demands who shall say for them, to which they answer, their foreman. This being done, he desires the prisoner to hold up his right hand, and addresses them: 'Look upon the prisoner, you that are sworn; how say you, is he guilty of the felony (or treason, &c.), whereof he stands indicted, or not guilty?' (The foreman then answers 'guilty,' or 'not guilty,' as the verdict may be.) The officer then writes the word 'guilty,' or 'not guilty,' as the verdict is, after the words '*po. se*' on the record, and again addresses the jury: 'Hearken to your verdict as the court hath recorded it. You say that A. B. is guilty (or not guilty) of the felony whereof he stands indicted, and so say you all.'" ¹

The course of procedure may not be formally according to this practice in our States, but it is substantially so.² Thus, it is held in a case in Virginia, after a verdict in felony has been received and read, it is the duty of the clerk to direct the jury to hearken to their verdict as the court has recorded it; then to repeat it to them and say, "And so say you all," or words to this effect; nor is it perfected until their assent is thus given, any one having a right to retract.³ Where a jury having come in with their verdict in a capital case, the court inquired of the defendant's counsel whether he would poll them; then whether he knew any reason why it should not be received; to both which questions he replied in the negative. After the verdict was delivered and the jury dismissed and dispersed, but within ten minutes, the court, remembering that they had not been called over each by name before the verdict was delivered, had them reassembled, an oath administered, and each juror swore that he was in the box when the verdict was delivered, that he heard it read, that it found the

¹ 1 Chitt. C. L. 635; Co. Litt. 227; 3 Inst. 110.

² Bishop, Crim. Proceed. vol. 1, § 1001.

³ Commonwealth v. Gibson, 2 Va. Cas. 70.

defendant guilty of murder, and that he agreed to it. There was held to be no ground for a new trial.¹

§ 453. A verdict by agreement rendered out of court, in a criminal case, is irregular. An agreement in a capital case, between the district attorney and the counsel for the prisoner, that the jury may deliver their verdict to the clerk, is void, and a verdict delivered in this way will be set aside.²

The judge must preside when a verdict is returned into court; so the clerk of the court cannot by agreement of the parties to an action, in the absence of the judge, preside at the return of the verdict, and, during the polling of the jury, receive the verdict and discharge the jury;³ and a judge cannot, because he is "weary," orally authorize an attorney to receive the verdict of a jury. The fact that the counsel are present does not make the appointment effective.⁴

A verdict rendered in presence of the parties, without objection, when one of the assistant judges has left the bench, is not illegal.⁵

§ 454. The prisoner must be present when a verdict is rendered in open court in a case of felony.⁶

In *People v. Perkins*⁷ it was held that a prisoner tried for felony must be present on the taking of the verdict. *Savage, C. J.*, said, that "though many of the ancient forms on trials

¹ *Mitchell v. State*, 22 Geo. 211. See, further, *Blackley v. Sheldon*, 7 Johns. 32; *Raymond v. Bell*, 18 Conn. 81; *Johnson v. Howe*, 2 Gilman, 342; *Sartor v. McJunkin*, 8 Rich. 451. On the trial of a prisoner for felony, a jurymen by mistake delivered the verdict "not guilty," when the jury meant "guilty." The prisoner was discharged from the dock, but some of the jury then interposing, he was immediately brought back again, and the jury were again asked what their verdict was. They said "guilty," and the prisoner was therefore sentenced. It was held that the original mistake was corrected within a reasonable time, and, therefore, that the conviction was right. *Regina v. Vodden*, 22 Eng. L. & Eq. 596. If one of the jurors, on being asked, "Is this your verdict?" say, "It is, as far as it goes," it will be taken to be an assent. *Rankin v. Harper*, 23 Mo. 579.

² *Nomaque v. People*, Breese, 109. The judge's reception of a verdict out of court, and discharge of the jury without consent of parties, is error. *Tuhe v. Eber*, 19 Ind. 126.

³ *Willet v. Porter*, 42 Ind. 250; *State v. Mills*, 19 Ark. 476.

⁴ *Britton v. Fox*, 39 Ind. 369.

⁵ *Watham v. Penabaker*, 3 Bibb, 99.

⁶ 1 Chitt. C. L. 686.

⁷ 1 Wend. 91.

are now dispensed with, the prisoner should have been present on receiving the verdict, so that he might have availed himself of the right of polling the jury." The reasons for the presence of the prisoner on such an occasion are well stated in a Mississippi case,¹ where it is held that the verdict in criminal cases must be delivered in open court, and in the presence of the accused, and this rule is founded on two reasons: 1. The right of the accused to be present and to see that the verdict is sanctioned by all the jurors. 2. In order that the accused, if convicted, may be under the power of the court, and subject to its judgment.

Where the verdict of the jury, in a capital case, is received and read aloud in open court, in the absence of the prisoners, and the jury are then told by the court that they are discharged, it is within the power of the court to call them back before they have left the bar, and if they are immediately recalled, upon the discovery being made that the prisoners are not in court, and the papers in the case are handed back to them, the prisoners are not deprived of their right to poll the jury, nor can they complain on error of this action of the court.²

§ 455. A verdict delivered on a Sunday is a nullity, unless it is permitted by statute, as it is in some of our States.³ At common law Sunday was always considered *dies non juridicus* as to process, though deeds and other acts not in the ordinary way of business may be executed on that day.

In *Bass v. Irvin*,⁴ the court in Georgia, reviewing the authorities there, and the decisions elsewhere, decided that a

¹ *Stubbs v. State*, 49 Miss. 716. See, to the same effect, *State v. Bray*, 67 N. C. 283; *State v. Braunschweig*, 36 Mo. 397. A judge has no authority to receive a verdict in the absence of the plaintiff, unless with his express consent. *People v. Mayor, &c.* 1 Wend. 36. A verdict in a criminal case may be received in the absence of defendant's counsel, and in a conviction for a simple assault, the presence of the defendant himself is not requisite. *State v. Shepard*, 10 Iowa, 109; *Crusen v. State*, 10 Ohio N. S. 258; *Kennedy v. Raught*, 6 Minn. 235.

² *Brister v. State*, 26 Ala. 107.

³ The New York Revised Statutes provide that "no court shall be opened or transact any business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury." 2 Rev. Sta. 276. See *Hoghtaling v. Osborn*, 15 Johns. 118.

⁴ 49 Geo. 436.

judge could not open his court and receive a verdict from the jury on Sunday.¹

The Supreme Court of New Jersey say: "I understand there are many instances of the rendering of verdicts on the Sabbath in the circuits of New Jersey, and although it is the solemn duty both of courts and juries so to arrange their business, and so to discharge their duties, as never to encroach in the smallest degree on the Sabbath, if it be possible to avoid it; yet where the jury have been compelled to reach the morning of that day before the verdict was prepared, I see no mode of proceeding so proper as to receive the verdict, dismiss the jury and parties, and at such future day as may be convenient and proper take the subsequent proceedings. This must be done *ex necessitate*."²

Similar views are held in Ohio. In *State v. Engle*³ it is said that "cases may occur where public excitement runs so high as to create just cause to fear that improper influences may be brought to bear upon jurors if allowed to separate, and to justify a court in keeping them in confinement till the delivery of their verdict, or to justify the court in convening upon the Lord's day to receive it and discharge them; but these cases are too seldom to warrant the refusal of any discretion to the courts of criminal jurisdiction." It is held under a construction of a statute in Texas, that a verdict returned on the Sabbath in a case submitted to the jury on the last Saturday of the term of the District Court is a nullity.⁴

§ 456. **Amending the Verdict.** — Until the verdict is actually rendered and recorded, the jury have power over it, either to alter it or withdraw from it. Until received by the court, and discharged from its consideration, they have full control over it.⁵

¹ *Davis v. Fish*, 1 Green (Iowa), 410; *Sorrelle v. Craig*, 9 Ala. 534. Contra, *Commonwealth v. Marrow*, 3 Brews. (Pa.) 402. In *Winsor v. Queen*, 118 Eng. L. 141, decided in 1866, the question of receiving a verdict on Sunday was incidentally before the court, but not directly passed upon. However, Cockburne, C. J., said it should not be received, in his opinion.

² *Van Riper v. Van Riper*, 1 South. 156. So in *Huidekopper v. Cotton*, 3 Watts, 56.

³ 13 Ohio, 490.

⁴ *Harper v. State*, 43 Tex. 381.

⁵ *Root v. Sherwood*, 6 Johns. 68; *Thomas v. Zushlag*, 25 Tex. Sup. 225; *State v. Waterman*, 1 Nev. 543.

In *Walters v. Jenkins*¹ the jury returned the following verdict: "We find for the plaintiff six cents damages." The court asked them if they found the defendant to pay all costs, or only the legal costs. The foreman replied, "Six cents damages, and six cents costs." The verdict was thereupon recorded. The jury remained while another cause was progressing. It was intimated to plaintiff's attorney that the jury intended to find full costs against the defendant. The court instructed the jury to retire and certify what was their verdict. In a few minutes they returned and said their finding had been six cents damages and full costs. Whereupon the court allowed the minutes to be corrected according to the real finding of the jury. The jury had not been formally told that they were discharged; but the court had proceeded with another cause. The judgment was reversed. The court in reversing the judgment said: "After the jury have rendered their verdict, it is read to them, that they may say whether the court have recorded it according to their finding. If any mistake should have occurred, it may immediately be corrected. To permit an alteration after the jury are dismissed, would lead to great abuses, and I am unwilling to extend the principle farther than the adjudged cases. How long shall this privilege last? How draw the line of distinction, and in what manner shall we ascertain whether it be the correction of an honest mistake, or the result of improper tampering and out-of-door management with the jury. The remedy attended with the least danger is to commit the cause to another jury, on a motion for a new trial. The law allows the jury all reasonable opportunity, before their verdict is put on record and they are discharged, to discover and declare the truth according to the judgment."

§ 457. The court may direct the jury to amend, when the verdict is imperfect and informal, and may send them back to the jury room for that purpose.² Great injustice would frequently be done where the jury are mistaken, unless they had

¹ 16 Serg. & R. 414.

² *Flinn v. Barlow*, 16 Ill. 39; *Goodwin v. Appleton*, 2 Me. 453; *Cook v. State*, 26 Geo. 593.

an opportunity of rectifying, under the eye of the court, such error as they may have committed.¹

Where the meaning intended to be conveyed by the jury can be ascertained from their verdict, the court may instruct the jury to alter the expressions, preserving the substance so as to render it good in law; and the court should give effect to a verdict when its meaning can be ascertained.² But when the jury return a general verdict settling the rights of the parties, and upon which judgment can be entered; or where they return a special verdict, finding the facts of a case, and leaving the questions of law arising upon those facts to the court, it would be improper for the court to send them out again for further consideration. But where the jury have decided the issue between the parties, but have failed to return a complete verdict, as, for instance, where, in an action on a promissory note, they have found for the plaintiff the amount of the note with interest, but have not specified in dollars and cents that amount, they may with propriety be returned to their room to make the computation of interest.³ So, in an action for trover for certain promissory notes, where the title and not the value was the only subject in controversy, the jury being sent out late in the evening, with permission to separate after agreeing and sealing up their verdict, did so, and returned a verdict the next morning for the plaintiff, with the amount of damages in blank, the foreman observing that they had some doubt as to the time from which interest should be computed, and that some supposed that this would be done by the court; whereupon, by direction of the judge, they retired again, and returned a new verdict for the amount of the notes and interest, and it was held good.⁴

§ 458. Directing an amendment in a criminal case, when the jury return a general verdict, is, at present, somewhat

¹ *Hobson v. Humphries*, 2 Mill, Const. 371.

² *Truebody v. Jacobson*, 2 Cal. 269.

³ *Hitchcock, J., Sutliff v. Gilbert*, 8 Ohio, 495. The verdict of a jury is sufficient, although it be informal, and do not find in terms the issue submitted to them, if it find the very matter on which the issue depends, and from which it is necessarily concluded. *Litchfield v. Londonderry*, 39 N. H. 247; *Allen v. Aldrich*, 9 Fost (N. H.) 63.

⁴ *Bolster v. Cummings*, 6 Greenl. 85.

rare; though the English courts formerly exercised, and do to some extent at present exercise an authority which would be considered here unwarrantable. In the first chapter of this work it was shown how arbitrarily and peremptorily judges dealt with juries who ventured to return a verdict contrary to the express direction or wishes of the court. That power, however, was not supported, and after a time intrepid judges laid down the rule that no jury could be punished for, or coerced into, giving a verdict.

Thus, in an English case, the jury at a sessions gave a special verdict of not guilty, and it was entered in the book of the clerk of the peace. Afterward the chairman told the jury they must reconsider their verdict; and they gave a verdict of guilty generally, but recommended the defendant to mercy on account of his not doing the act with a malicious intent; and the verdict was then altered in the book of the clerk of the peace. The court refused to interfere by *mandamus* to cancel the alteration. Said Littledale, J.: "Whether the verdict is entered properly or improperly is matter for the consideration of the court in which the trial took place."¹ In a later English case it was held that the judge was not under a legal duty to receive the first verdict which is returned by the jury. Pollock, J., said in the case, that "A judge has a right, and in some cases it was his bounden duty, whether in a civil or in a criminal cause, to tell the jury to reconsider their verdict. He is not bound to receive their verdict unless they insist upon his doing so."²

§ 459. An amendment is properly directed in a criminal case when the jury bring in a verdict not conforming to the charge in the indictment, or when its language is not formally correct to support such a judgment as the jury expected

¹ *Rex v. Hughes*, 1 Har. & W. 313.

² *Reg. v. Meany*, 1 Leigh & C. 213; 9 Cox C. C. 231; to the like effect, *State v. Underwood*, 2 Ala. 744; *McGregg v. State*, 4 Blackf. 101; *Straughan v. State*, 16 Ark. 37. In a North Carolina case, on the trial of an indictment against two defendants, the jury came into court and intimated an intention to acquit one of them; and the court remarked that if one was guilty both were. Thereupon the State's attorney ordered the clerk to enter a verdict against both, and the jury were asked if any of them disagreed to such verdict, to which the only reply was a nod. It was held that a new trial ought to be granted on account of the irregularity in the proceedings. *State v. Shule*, 10 Ired. 153.

would be rendered on the verdict. As where in a case of homicide a statute requires the jury to find the degree, if they come in with a general verdict of guilty, the court should order them to retire again and bring in a special verdict.¹

On this subject a writer says: "When the jury come in with their verdict, it is not, as of course, to be immediately received in the form in which it is rendered. And it is probably the correct doctrine that the judge may require the jury to pass by their verdict upon the whole indictment, in such form of words as shall constitute a sufficient finding in point of law; or if they refuse, decline altogether to accept the verdict. It seems quite plain that in every case of a verdict rendered, the judge or prosecuting officer, or both, should look after its form and its substance so far as to prevent a doubtful or insufficient finding from passing into the records of the court."²

§ 460. *Amending a Sealed Verdict.* — A sealed verdict is not of any validity until it is rendered and recorded in court. Hence, the jury may withdraw from it when presented in open court, and may of their own motion, or on direction of the court, retire again to alter or modify it. So where by consent of parties the jury, after adjournment of court for the day, signed and sealed their verdict, and delivered it to the clerk of the court, and when called on at the bar the next morning before the verdict was recorded, they were sent back to correct it, it was held that the second verdict was valid.³ And when a jury rendered a sealed verdict and then separated until morning, when they gave it in; the verdict being defective, the court directed them to retire and reconsider it,

¹ *People v. Marquis*, 15 Cal. 38; *People v. Bonney*, 19 *Ibid.* 426.

² *Bishop, Crim. Proced.* vol. 1, § 1004. The California Penal Code, §§ 1161, 1162, has made provision for a reconsideration of a verdict. It provides: "When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider their verdict, and if after the reconsideration they return the same verdict, it must be entered; but when there is a verdict of acquittal the court cannot require the jury to reconsider it. . . . If the jury persist in finding an informal verdict, from which however it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal."

³ *Edlin v. Thompson*, 2 *Harr. & G.* 31; *Barnes v. Strockhecker*, 17 *Geo.* 340.

which they did, and returned with a correct one; and it was held that this proceeding was not improper.¹

In an action upon a note, the parties consented that upon the agreement of the jury they might seal and return their verdict to the clerk, which was done. The verdict upon being opened the following morning was found to be in this form: "We the jury find for the plaintiff." Whereupon the court had the jury recalled and instructed them to put their verdict in form, which they did by adding, "for the sum of \$590.40," that being the amount of the note sued on with interest. There was no controversy as to the amount plaintiff was entitled to recover, if entitled to recover at all. It was held there was no error in this action of the court.² And where the jury by consent of parties sealed up their verdict and separated for the night, the verdict was allowed to be altered on its presentation the following morning, though by such alteration the verdict became one *against* instead of *in favor* of the plaintiff.³

§ 461. The amendment should be made when the jury are before the court and under its control. After the verdict has been received and the jury dismissed, no amendment in substance is proper.⁴ So, when a jury have rendered an imperfect verdict, which has been received and recorded, and the jury have been discharged from the cause, the court has no right afterwards to reassemble the jury and amend the verdict according to what the jury then state it was their intention to find, such intention not appearing on the face of the verdict.⁵

Where damages were duly assessed by a jury, but were not inserted in the verdict before they separated, it was held that inserting the amount thus ascertained, and which constituted an element of the finding, was an authorized amendment of the verdict before it was accepted or affirmed.⁶

When a jury render an informal verdict requiring explanation, the court may inquire of them, even after they have

¹ *Tyrrel v. Lockhart*, 3 Blackf. 136; *Pritchard v. Hennessey*, 1 Gray, 294.

² *Higley v. Newell*, 28 Iowa, 516.

³ *Beal v. Cunningham*, 42 Me. 216.

⁴ *Wright v. Phillips*, 2 Greene, 191; *Snell v. Navigation Co.* 30 Me. 337.

⁵ *Settle v. Allison*, 8 Geo. 201.

⁶ *Doe v. Scribner*, 36 Me. 168.

separated, what they intended to find, and the verdict may then be reduced to form.¹

The amendment must be made when all the jury are present. Therefore, where in a case of felony a verdict was agreed on and written in the jury room, and read in open court, and the clerk then in open court, before the discharge, amended the verdict in an immaterial point; but before the amended verdict was read, one of the jurymen, being sick, retired to the jury room without the knowledge of the jury or of the court, and the eleven agreed to the amended verdict, it was held that as the twelfth juror did not assent to the verdict it was a nullity.²

§ 462. A juror on presentation of a verdict may dissent therefrom, even if he had previously given his assent. But when the foreman has answered, and the verdict is read over in the hearing of the jurors, and they are dismissed, no expression of dissent can be heard from the jurors. An affidavit of one of them that he did not assent to the verdict cannot be received afterwards.³

But where some of the jury disagree to the verdict after it is announced, it will nevertheless be sustained, if they subsequently agree to it. Thus, in an action for slander, it was late in the evening when the cause was committed to the jury. The judge, without the express consent of the counsel, directed them to seal up their verdict, and bring it into court the next morning. They presented their sealed verdict according to the direction of the court; but afterwards when polled one of them refused to agree to it. When asked why he signed the verdict, he said he was unwell and unable to sit up all night. The judge sent the jury out again, and they finally brought in the same verdict which they had signed and sealed the pre-

¹ *Clough v. Clough*, 6 Foster, 24.

² *Commonwealth v. Gibson*, 5 Virg. Cas. 70.

³ *Breck v. Blanchard*, 7 Foster, 100; *Raymond v. Bell*, 18 Conn. 81; *Johnson v. Davenport*, 3 J. J. Marsh. 390. In this last case the subject of affidavits from jurors in relation to their verdict is examined. The assent of the foreman to the verdict as recorded is conclusive upon all the jurors, unless a disagreement be expressed at the time. *Blum v. Pate*, 20 Cal. 69. In *Green v. Bliss*, 12 How. Pr. 428, there is a very full examination of authorities regarding the mode of giving assent to a verdict when presented, and when such assent is conclusive.

vious evening. The juror who had dissented from the sealed verdict, stated to the court that he had received such explanation of the testimony from his fellows that he was therefore satisfied with the verdict. The court held that as the defendant made no objection to the course pursued, he must be deemed to have tacitly assented to it; and that the verdict could not therefore be set aside for the alleged irregularity in receiving it.¹ In *Bunn v. Hoyt*,² which was an action of assumpsit, the jury retired from the bar to consider their verdict. After being together several hours they separated, and the next morning delivered a sealed verdict for the plaintiff. When the verdict was rendered, defendant's counsel requested that the jury might be polled. One of the jurors, on being asked whether he agreed to it, said that he could not agree to it; that he had signed the sealed verdict as a matter of accommodation; but he thought it unconscientious and could not assent to it. The judge then directed the jury to retire and reconsider their verdict, to which defendant's counsel objected. But the jury were sent out, and after being absent some time they gave information to the court that they could not agree upon their verdict, upon which they were informed, by the direction of the judge, that they *must* agree. After remaining out several hours, they returned with a verdict for the plaintiff for the same amount as before. The Supreme Court held that there had been no irregularity such as to render it proper to set aside the verdict.

§ 463. *Amendment by the Court.* — It is practically of the utmost importance to determine when and how far a verdict can be amended at the instance of the court, without the action of the jury. It must be admitted that such amendment is often made without any error. It is evident that the court, in this respect, should proceed very carefully, or a power might be exercised of overruling the action of a jury. As a general proposition, after a verdict is accepted it cannot be amended so that its *meaning or effect* may thereby be altered. The practical difficulty will, therefore, be to determine when this may be done by the court without altering the

¹ *Douglass v. Tousey*, 2 Wend. 352.

² 3 Johns. 255.

meaning and effect of the verdict.¹ This will be best understood from an examination of the authorities, which agree to this extent, that a verdict may be amended in matters of form, though not of substance, to express more correctly what the jury mean, when the intention is apparent without any extrinsic proof.

§ 464. An examination of the cases in reference to amendment by the court will show how strictly the courts adhere to the general rule laid down in the last section. "When the intention of the jury is manifest," says Lord Mansfield, in *Hawkes v. Crofton*,² "the court will set right matters of form." Thus, in *Petrie v. Hannay*³ the defendant had pleaded the general issue and the statute of limitations. There was a verdict for the plaintiff upon the first plea, but nothing said about the other. Error was brought on this ground; but the court ordered the verdict to be amended so as to make it applicable to both issues.

In *Peabody v. Hewitt*⁴ it was held that where, from a formal defect in a deed submitted to a jury, they found for the claimants the *entire* premises described in the writ, when in fact they owned only an aliquot part, the court caused the verdict to be amended when the cause of the error so plainly appeared.

In *Clark v. Lamb*,⁵ a leading case on this subject, where the jury in a general verdict failed to pass upon an issue, which applied to the same cause of action as the others, it was held that the verdict might be amended from the judge's notes.

From these and other cases we may extract this principle, that where the jury, in a *general verdict*, omit to pass upon some issues *that do not invalidate the cause of action set forth*,

¹ Where the jury express their meaning in an informal manner, the court will work the verdict into shape and make it serve. Otherwise where the jury as to part of the issue fail to express any opinion at all. *Wood v. McGuire*, 17 Geo. 361; *Corbett v. Gilbert*, 24 Ibid. 454; *Galbreath v. Atkinson*, 15 Tex. 21; *Coit v. Waples*, 1 Minn. 134; *Dana v. Farrington*, 4 Ibid. 433; *Sleight v. Henning*, 12 Mich. 371; *Armstrong v. Pierson*, 15 Iowa, 476; *Russell v. Wheeler*, 1 Hamp. 3; *Porter v. Rumming*, 10 Mass. 64.

² 2 Burr. 698.

³ 3 T. R. 659.

⁴ 52 Me. 33.

⁵ 8 Pick. 415. In this case the authorities are very fully examined.

the verdict may be amended to conform to the evidence as given on the trial.¹

In a special verdict no power is given to the courts to amend by reference to the record, except in mere matters of form; for then it is assumed the jury found no more nor less than what is set forth.²

It may be asked if an amendment of a general verdict as stated above is not an alteration or modification in substance. It cannot be so considered; for the amendment is only made to conform to the *manifest intention of the jury*, which not being expressly declared when a general verdict is rendered, is ascertained from the record. This intention, however, must be explicit and open. So the court in *Burhans v. Tibbits*,³ where this subject is examined, say: "I admit that extreme caution should be used in allowing such amendments. Where the slightest doubt exists as to the real intention of the jury, their verdict ought not to be changed. But where no such doubt exists, it would be an unnecessary obstruction to the administration of justice to refuse such an amendment. When mistakes occur, and occur they will and do, every court will feel bound, so far as practicable without injustice to any one, to correct them."

A decision in New York, in *Emerson v. Bleakley*,⁴ allowed this power of amendment to a considerable extent. In an action to recover specific personal property, the jury found for the plaintiff as to the one part, and for the defendant as to the other, designating the articles generically, without specifying them in detail. It was held that it was competent for the court to render the verdict certain by directing an amendment of the complaint, inserting therein a list of each class of articles intended by the generic designation of the verdict. The court say of this: "I think it was competent for the court to amend the verdict, as was in effect done, for the purpose, not

¹ *Baker v. Rand*, 13 Barb. 152; *Jones v. Kennedy*, 11 Pick. 125; *Sayre v. Jewett*, 12 Wend. 135; *Cooper v. Bissell*, 15 Johns. 318; *Scott v. Galbraith*, 1 Dallas, 134; *Sullivan v. Holker*, 15 Mass. 374; *Stafford v. Green*, 1 Johns. 505; *Hay v. Justerout*, 3 Ohio, 384.

² See § 440.

³ 7 How. Pr. 21.

⁴ 2 Abb. App. Dec. 22.

of adding or subtracting, but specifying in accordance with the evidence, as was done in this case.”¹

§ 465. Polling the Jury. — In a civil case it is not a matter of right to have the jury polled when a verdict is delivered; though it is frequently done at the request of a party.

As a general rule, the right to poll the jury in a criminal case is permitted.² The reason of requiring the presence of the prisoner when a verdict is announced, as has been previously stated,³ was to give an opportunity to poll the jury; and it seems unreasonable, therefore, to deny the right in a criminal case; yet in Massachusetts it is held that it is not a right either in a civil or criminal case.⁴

In *Fellow's case*⁵ it is held that a defendant has no right, in any case, upon the coming in of the traverse jury, to have them polled, and each one separately interrogated as to his assent to the verdict.

In a case in South Carolina, after a verdict of guilty on a trial for murder, the prisoner's counsel moved to have the jury polled; but as the court perceived nothing to create a doubt respecting the agreement and concurrence of the whole jury, the motion was refused, and it was held that such refusal was proper.⁶

¹ Citing *Sleight v. Hartshorne*, 1 Johns. 149; 1 Sell. Pr. 480. A general verdict in favor of one party rendered in obedience to instructions, cannot be corrected on motion, so as to transform it into a verdict for the other party. *Brush v. Kohn*, 9 Bosw. (N. Y.) 589. A judge having erroneously directed a jury that their verdict, fixing a term of imprisonment at two years and six months, was bad, sent them out, when they fixed the term at three years. Discovering his error, he entered the verdict for the term which the jury first returned, and pronounced judgment. Held good, *Henalie v. State*, 3 Heisk. 202; *Chittenden v. Evans*, 46 Ill. 52.

² *State v. Allen*, 1 McCord, 525; *Nomaque v. People*, 1 Breese, 111; *People v. Perkins*, 1 Wend. 91; *Fox v. Smith*, 3 Cow. 23; *State v. Hardin*, 1 Bailey, 3; *Sargent v. State*, 11 Ohio, 472; *Johnson v. Howe*, 2 Gilm. 342; *U. S. v. Potter*, 6 McLean, 186.

³ See § 448.

⁴ *Ropps v. Barker*, 4 Pick. 238; *Commonwealth v. Roby*, 12 Ibid. 496; *Commonwealth v. Costley*, 118 Mass. 1.

⁵ 5 Greenl. 333.

⁶ *State v. Wise*, 7 Rich. 412. In the California Penal Code, § 1163, it is provided: "When a verdict is rendered, and before it is recorded, the jury may be polled at the request of either party, in which case they may be severally asked

§ 466. **Conclusiveness of the Verdict.** — A verdict is not always conclusive. The idea of finality which attached to the verdict of a jury in the beginning, can no longer be maintained. We are too accustomed, in these times, to observe so many instances of verdicts being set aside on account of the irregular or erroneous action of the jury, and too familiar with the shortcomings of jurors to look upon their verdict as the final determination of an action at law. We rather regard it, when a verdict is rendered, as still a *lis sub judice*, which has to pass through review and examination in an appellate court, before the action of the jury is accepted as final.

While many may consider this a serious disadvantage, we cannot regard it otherwise than as supplying a serious defect in our jury system. The gravest charge now brought against that system are the frequent mistakes, either ignorant or wilful, made by the jury in the apprehension and application of the evidence, and their liability to be controlled at times by prejudice and passion. That this charge is not unfounded, every one acquainted with our jury system must admit. But were there no means of remedying this defect, no way of correcting the wrong action of a jury, this would be a grievous injury. Happily the power now exercised by, and permitted to, appellate courts to review the action of a jury and correct its errors and deficiencies, removes to a great extent the imperfections of our jury system, and enables abuses to be corrected that would otherwise be irremediable. Nothing shows more plainly the duty of the jury to be governed by the law as laid down to them by the court, than the right now generally exercised to set aside a verdict when the jury have disregarded the instructions of the court, or when they bring in a verdict unwarranted by the pleadings or evidence.

§ 467. In one instance a verdict is final, that is in case of a verdict of acquittal. Whatever errors may have been made by the jury in the application of the law, or however

whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation." In *Byrne v. Grossman*, 65 Penn. St. 310, the court was of opinion that it is discretionary with the judge in a civil case to allow a jury to be polled. In Georgia, in criminal cases, the privilege of polling the jury is a legal right in the defendant, and does not depend on the discretion of the court. *Tilton v. State*, 52 Geo. 478.

perversely they may have acted, and in defiance of the plain and positive instructions of the court, their verdict of acquittal in a criminal case is final; the court cannot set it aside for any error of law, or any disregard of the evidence.¹ While in case of a conviction the prisoner has a right to have the action of the jury reviewed, in case of acquittal no such right is given to the people. It is for this reason, no doubt, that the doctrine has been maintained, that in criminal cases the jury are the judges of the law and fact. On this a writer remarks: "The law puts it into the power of a jury in a criminal case to find either for or against the defendant as they may deem right; and if they think the judge errs in his expositions of the law, they do not violate their oath should they disregard them. If they bring in a general verdict of acquittal, the court has no power in law to set the verdict aside. Neither can the court punish the jury for this, however much they may have misapprehended the law, or however obstinately they may have disregarded the instructions of the judge. *Legally*, therefore, they have the right to follow their own views, when those views conduct to an acquittal; since the law inflicts on them no punishment, and provides in the case no redress, if they do not."²

¹ Boren v. Bartleson, 39 Ill. 43.

² Bishop, Crim. Proc. vol. 1, § 985. In New York, before the adoption of the Revised Statutes, it was claimed that the people could have a review in case of acquittal, but in the Revised Statutes there is provision for a review by a bill of exceptions at the instance of the prisoner; but there is no such right given on the part of the State. In *People v. Harting*, 26 N. Y. 154, there is an able and exhaustive examination of this question. The practice in that State before the Revised Statutes is thus pointed out in Colby's Criminal Practice, p. 441: "Prior to the Revised Statutes there was no bill of exceptions in a criminal case, and writ of error thereon for review of convictions in the Oyer and Terminer. The review was obtained in this manner. The court suspended passing sentence, and certified the question which was in doubt to the Supreme Court, who considered and passed upon it and advised the court below either to grant a new trial or proceed to pass sentence, and sometimes, when the convict was before them, they passed the sentence themselves. Whether the trial was to be reviewed was at the option of the court before which it was had, and the party had no right, as in civil cases, to take exceptions and carry up the record for review. In case the judge consented to a review, the necessary time for that purpose was given either by the court suspending its judgment, or after judgment pronounced by suspending execution." This was conformable to the English practice. See *State v. Buchanan*, 5 Harr. & J. 317, where the subject is exhaustively examined, and where it is held that a writ of error lies at the instance of the State in a criminal prosecution.

§ 468. **Conclusiveness as to Parties of Record.** — No one can be bound by a verdict except the parties of record brought under the jurisdiction of the court. So, under a statute enacting that the verdict of a jury as to a disputed will shall be final between the parties, the verdict only affects parties of record.¹ A general verdict against the defendants in an action, including not only those who were parties to the issue, but also those dead, and those not served because out of the jurisdiction of the court, though irregular, is valid against those who were parties to the issue.²

PART VI. SETTING ASIDE THE VERDICT.

§ 469. **For what Causes generally.** — In the course of the inquiry in the last chapter and the present, there has been pointed out various causes for which a verdict will, and ought, to be set aside. For misconduct in the jurors, for mistakes in the application of the law, for a defect in the verdict, — all these various causes have been noticed in detail in the progress of the examination. It is, therefore, only necessary to notice other causes, connected with the action of the jury, for which a verdict will be set aside. It must, however, be remarked, that there must be palpable, unmistakable error before the court is authorized to set aside a verdict. A verdict is an act of such a solemn nature, that unless the finding of the jury be clearly wrong, the court will not disturb it; as far as possible, its validity and regularity is to be presumed.³ In addition to the causes already pointed out, a verdict is frequently set aside for want of evidence to support it, or where it is manifestly against the weight of evidence.

§ 470. **Where the jury disregard the evidence, except in the instance before mentioned, it is the duty of the court to set aside the verdict.** As where, in a civil action for assault, the jury acquit on some false hypothesis of self-defence, against the evidence.⁴

¹ *Holt v. Lamb*, 17 Ohio N. S. 374.

² *Sanders v. Etcherson*, 36 Geo. 404.

³ *McMillan v. State*, 35 Geo. 54; *Wiggin v. Coffin*, 3 Story, 1; *Bank v. Wilson*, 14 Ark. 113; *Thomasson v. State*, 22 Geo. 499; *Van Norman v. Wheeler*, 13 Tex. 216; *Antoine v. Ridge Co.* 23 Cal. 219.

⁴ *Boren v. Bartleson*, 33 Ill. 43.

And where a good and defective cause of action are so combined in the counts of a declaration that it is impossible to know for which alleged injury the jury found a verdict, it will be set aside.¹

Where a judge, thinking the plaintiff's evidence insufficient to support his action, stops the defendant from producing his evidence, and the jury, notwithstanding, find a verdict for the plaintiff, the court will set aside the verdict.²

In an action on a promissory note, the defence of infancy was fully and completely established by two witnesses, and there was no evidence to contradict or avoid the defence. The jury, however, found for the plaintiff; it was held that under these circumstances the verdict was properly set aside.³ So, where it appeared probable that the jury, in making up their verdict, rejected from their consideration certain evidence, which, if allowed its proper weight, would have materially changed the verdict.⁴

§ 471. When there is no evidence to sustain the verdict it should be set aside, or when there is a defect or failure of evidence as to any material fact necessary to uphold the verdict. The jury are sworn to decide according to the evidence: and it must be a mere nullity when a verdict is found having no evidence to sustain it, or when a fact is found upon which there was no testimony offered. In this case courts have no hesitation in setting aside the verdict.⁵ To constitute an insufficiency of evidence to sustain a verdict, there must be such a want of evidence on some material point in issue as satisfies the court that the jury in their finding were influenced by partiality or prejudice, or misled by some mistaken view of

¹ *Ottawa, &c. Co. v. Thompson*, 29 Ill. 598.

² *Dunham v. Baxter*, 4 Mass. 79; *Bridge v. Austin*, Ibid. 115.

³ *Algeo v. Duncan*, 39 N. Y. 313.

⁴ *Bank v. Small*, 26 Me. 136; *Wendall v. Safford*, 12 N. H. 171; *Thomas v. Hatch*, 3 Sumn. 170.

⁵ *Hicks v. Maness*, 19 Ark. 701; *People v. Ah Ti*, 9 Cal. 16; *Cummings v. Scott*, 20 Cal. 83; *Howard v. Coshov*, 33 Mo. 118; *Hall v. Page*, 4 Geo. 428; *White v. Clayes*, 32 Ill. 325; *Bevan v. Tomlinson*, 25 Ind. 253; *Ermul v. Kullock*, 3 Kan. 499; *Smith v. Tiffany*, 36 Barb. 23; *Rowe v. Collier*, 25 Tex. 252; *Brassfield v. Brown*, 4 Rich. 298; *McGrath v. Herndon*, 4 T. B. Mon. 480; *Warren v. Gilman*, 15 Me. 70; *Parr v. Gibbons*, 27 Miss. 375; *Nickle v. Williamson*, 44 Ill. 48.

the case.¹ Where suit was instituted for damages alleged to have been sustained by the plaintiff in consequence of the closing of the ditches on his plantation, by the building of a railroad, and no evidence was given on the trial from which an estimation of the damages could be formed, and the jury found a verdict for the plaintiff for \$4,000, it was set aside.²

§ 472. When the verdict is clearly against the weight of evidence the court should set it aside. But it must be clearly and unmistakably against the weight of evidence as to show that the jury failed to examine the facts or duly consider the testimony.³ The court will not proceed to weigh the evidence to see on which side there is a preponderance; but it will take notice of a case where there is on one side clear, full, and trustworthy evidence, and on the other slender and defective evidence, when a verdict is founded on the latter, to set it aside. So, it is held where the court are of opinion that the jury could not have weighed the evidence in reference to the only material question joined, the verdict will be set aside;⁴ and so a verdict obtained at law on the testimony of a single witness, whose answer, when afterwards brought into equity on the ground of his being a partner, is clearly contradicted.⁵

Where a verdict was for the defendant in an action of trespass, and it appeared by the record that two witnesses testified to an admission of the defendant, which the jury must have disbelieved or disregarded, and by the record these witnesses stood impeached, it was held that the verdict was against the weight of evidence.⁶

¹ Johnson v. R. R. Co. 11 Minn. 296; Powell v. Bigley, 14 Geo. 41; Lewis v. Read, 6 Ark. 428; Waters v. Bristol, 26 Conn. 398; Smith v. Richards, 16 Me. 200; Heritage v. Hall, 33 Barb. 347; Schultz v. Pacific Ins. Co. 14 Fla. 73; Price v. Evans, 49 Mo. 396.

² Trudeau v. R. R. Co. 15 La. An. 717; Simpson v. Buck, 5 Lans. 335.

³ Wilson v. Janes, 3 Blatchf. 227; Benedict v. Lawson, 5 Ark. 514; Lyle v. Rollins, 25 Cal. 437; Branch v. Wilson, 12 Fla. 543; Long v. Lewis, 16 Geo. 154; Clement v. Bushway, 25 Ill. 200; State v. Miller, 10 Minn. 313; Wells v. Waterhouse, 22 Me. 131; Corlies v. Little, 14 N. J. L. 373; Scott v. Brookway, 7 Mo. 61; Wait v. White, 5 Ark. 640; Kinnie v. Kinnie, 4 Conn. 102; Tilley v. Spaulding, 44 Ill. 80. A new trial will not be granted simply because the verdict is against the weight of evidence unless it is flagrantly so. Moore v. Foster, 10 B. Mon. 255.

⁴ Court v. Sprague, 3 R. I. 205.

⁵ Verdier v. Hume, 4 Hen. & M. 479.

⁶ Roth v. Smith, 41 Ill. 314. In actions *ex contractu*, where it appears from the record that the jury have mistaken the evidence, or found against its clear pre-

§ 473. Where the evidence is conflicting, the verdict of the jury will not be disturbed.¹ This necessarily follows as a corollary from the proposition laid down in the last section. It is the province of the jury to weigh the evidence, and to judge of the credibility of the witnesses, and this must enable them to judge as to the *effect* of the testimony of one side as compared with the other, no matter how much difference there may be in the *amount* of the evidence, provided it does not appear that they disregarded the force and effect of the evidence on one side.

A verdict will not be set aside where there is a contrariety of evidence on both sides, and the facts and circumstances by a fair and reasonable intendment, will warrant the inference of the jury, notwithstanding it may appear to be against the strength and weight of the testimony.²

When there is no decided preponderance of evidence on either side, the case depending mainly upon the conflicting testimony of the parties themselves, who are equally respectable and unimpeached, the jury are the proper persons to decide between them as to whose testimony is entitled to the greatest credit, and the verdict ought not for this cause to be disturbed.³

The verdict ought not to be set aside on the ground that it is contrary to the evidence, where the evidence on both sides was merely circumstantial.⁴

§ 474. Where the verdict is manifestly against law, it should be set aside.⁵ The jury are bound to follow the in-

ponderance, the court never hesitates to set aside the verdict. In actions *ex delicto* the rule is more strict. *Dalton v. Clough*, 50 Ill. 47; *Feeter v. Whipple*, 8 Johns. 369; *Jarvis v. Hatheway*, 3 Johns. 180.

¹ *Lubeck v. Bullock*, 24 Cal. 338; *Fowler v. Waldrip*, 10 Geo. 350; *Smith v. Williams*, 22 Ill. 357; *Shanks v. Hays*, 6 Ind. 59; *Pilmer v. State Bank*, 19 Iowa, 112; *Dixon v. Merritt*, 6 Minn. 160; *Holden v. Bloxum*, 35 Miss. 381; *Lisbon v. Bath*, 23 N. H. 1; *People v. Goodrich*, 3 Park. Cr. 518; *Chevellier v. Brewer*, 6 Tex. 398; *Couch v. State*, 24 Tex. 557; *State v. Lamont*, 2 Wis. 437; *Treat v. Riley*, 35 Cal. 129; *Mitchell v. Tolley*, 4 Kan. 177; *Pleak v. Chambers*, 7 B. Mon. 565; *Fulkerson v. Bollinger*, 9 Mo. 838; *Lewis v. Blake*, 10 Bosw. (N. Y.) 198.

² *R. R. Co. v. Crandall*, 41 Ill. 234; *Berry v. Elliott*, 25 Ark. 89; *O'Brien v. Palmer*, 49 Ill. 72.

³ *Morse v. Sherill*, 63 Barb. 21; *Crawford v. Wolf*, 29 Iowa, 567.

⁴ *Sharp v. Wickliffe*, 3 Litt. 10; *Blanchard v. Colburn*, 16 Mass. 345.

⁵ *Ross v. Eason*, 1 Yeates, 14; *Moore v. Cherry*, 1 Bay, 269; *Dillingham v. Snow*, 5 Mass. 547; *Thomas v. Brown*, 1 McCord, 557; *U. S. v. Duval*, Gilpin,

structions of the court as to the law, and when it appears clearly that they have disregarded such instructions, and found a verdict contrary thereto, it is proper for the court to set aside the verdict, except in the case of an acquittal, where the jury's power is supreme. It is not, however, every mistake of law for which the court will set aside a verdict; but unless the court can see that no injustice has thereby been done, it will set it aside.¹ The court will not set aside a verdict for the plaintiff, though against law, where from the small amount of the recovery he is liable to pay costs to the defendant.²

356; *Emerson v. County*, 40 Cal. 543; *Rose v. St. Charles*, 49 Mo. 509; *Hunt v. Poole*, 1 Abb. (U. S.) 556.

¹ *Hinton v. McNeil*, 5 Ham. 509.

² *Hunt v. Burrell*, 5 Johns. 137. Wherever the law declares that certain facts are conclusive evidence of fraud, a verdict against such evidence should be set aside; but where such facts are declared to be only presumptive evidence of fraud, the jury may decide against such presumption. *Billings v. Billings*, 2 Cal. 107.

CHAPTER XI.

DISCHARGE OF THE JURY.

- § 475. Early Views respecting.
- § 476. The Opinion of Coke.
- § 477. The Rule as laid down by Lord Hale.
- § 478. As laid down by Blackstone.
- § 479. In Cases of Pressing Necessity Jury discharged.
- § 480. Rule as settled in Two Late English Cases.
- § 481. The Right to discharge in Case of Felony.
- § 482. The Doctrine now held in England.

IN THE UNITED STATES.

- § 483. Right allowed in Ordinary Criminal Cases.
- § 484. Doctrine formerly held.
- § 485. The Necessity justifying a Discharge.
- § 486. Rule laid down in U. S. v. Perez, by Story.
- § 487. The Effect of the Discharge.
- § 488. In Reference to the Discharge of a Juror.
- § 489. Juror may be discharged if Incompetent.
- § 490. The Result of the Cases.
- § 491. The Plea of Autrefois Acquit.

DISCHARGE OF THE JURY.

§ 475. Early Views respecting. — The view was formerly held, that the jury must in some manner agree upon a verdict. It was considered a lamentable failure if the trial did not result in a verdict for one side or the other. We have seen in a former chapter how this was accomplished by an *afforcing* the assize, as it was termed. When this practice became obsolete there was a pressure of another kind forcibly applied to bring about an agreement. This was the pressure, so effectual at that time, as it would be if now tolerated, of physical want and suffering.¹ It may well be reasonably expected that when

¹ The ancient practice in respect to the keeping of the jury is well known. But it may not be generally understood that it was carried out in its rigor until a very late period in England. The oath administered to the bailiff in ancient times was that the jury should be kept "without meat, drink, fire, or candle" until they were

compelled by cold and hunger conscientious scruples would soon give way. When such a mode of compelling a verdict was practised, it is no wonder that the discharge of the jury without a verdict was a rare occurrence, and that in criminal cases a discharge without a verdict was considered tantamount to an acquittal. However, the effect of such discharge has been for a long time, both here and in England, a subject of much discussion and difference of opinion. The reasoning was, that where the jury had to be discharged because of an inability to agree, it was an evidence that some had doubts of the prisoner's guilt, and that, therefore, in case he was called upon to plead to the same indictment, he could plead in bar as an acquittal the former discharge of the jury. This was based on the old maxim so much regarded in English constitutional history, *Nemo debet pro una et eadem causa bis vexari*, which is adopted in our Constitutions under the guarantee that "no one shall be twice put in jeopardy for the same offence."

§ 476. The opinion of Coke respecting the effect of a discharge of the jury, has led to much confusion and mistake. He lays it down that "a jury sworn and charged in case of life or member cannot be discharged by the court or any other, but they ought to give a verdict."¹ Whether the rule laid down by Coke was invariably acted on or not in his day is doubted, but it is certain that other authorities show that it was the practice a short time afterwards to discharge juries in criminal cases without a verdict, and try the prisoner again on the same indictment. The practice as indicated in the old work of Doctor and Student,² is believed to show more cor-

agreed. 3 Bl. Com. 375. Blackstone says this was "a method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern." In later times in England, the oath is to keep them "without meat, drink, or fire, candle-light excepted." *Winsor v. Queen*, 118 Eng. L. 165, note. On the trial of Lilburne for high treason, in 1649 (4 How. St. Tr. 1270), the judge told the jury, when they were about to retire, that they might have a light if they pleased. In the case of *Winsor v. Queen*, *supra*, Cockburne, C. J., assumed it as the regular practice then in England not to supply the jury with either meat, drink, or fire during the time of their deliberation on a verdict.

¹ Co. Litt. 227 b.

² Dial. 2, c. 52. The title of this chapter is worthy of note for its quaintness. It is styled, "The fifth question of the doctor, Whether it stand with conscience to

rectly the early views in England. It is there said: "If the case happen . . . that the jury can in no wise agree in that verdict, and that appeareth to the justices by examination, the justices may in that case suffer them to have both meat and drink for a time, to see whether they will agree; and if they will in no wise agree, I think that the justices may see such order in the matter as shall seem to them by their discretion to stand with reason and conscience, by awarding of a new enquest, and by setting a fine upon them that they shall find in default, or otherwise as they shall think best by their discretion; like as they may do if one of the jury die before verdict, or if any other like casualties fall in that behalf."

§ 477. The rule as laid down by Lord Hale shows that in his time it was the practice to discharge the jury at the instance of the prosecution, in order that the prosecution might be able to furnish evidence on the subsequent trial, which it could not do when the prisoner was first put upon his trial.¹ "Afterwards, in consequence of the abuse of this practice on political trials, and possibly in consideration of the hardship on the accused, who, being prepared for his defence on the first trial, might want the means for his defence on a second, the judges, after consulting among themselves,²—for it does not appear that there was any judicial decision upon the point,—adopted a different rule, viz, that, on a trial for felony, the jury should not be discharged at the discretion of the judge."³

This rule was not adhered to in Kinloch's case,⁴ on the special commission after the rebellion of 1745. In that case, after the jury had been charged with the prisoners, they were discharged, for the purpose of enabling the prisoners to put themselves in a better position to plead at another day. When the prisoners were found guilty on the second trial, it was ob-

prohibit a jury of meat and drink till they be agreed." The work was published in 1518, by Christopher Saint Germain, of the Inner Temple, a barrister of very extensive knowledge; and by all authorities is regarded as a work of much merit and accuracy.

¹ 2 Hale P. C. 295.

² Carth. 465.

³ Cockburne, C. J., in *Winsor v. Queen*, 118 Eng. L. 169.

⁴ Foster C. L. 16, 22.

jected that, as a jury had been once sworn and charged¹ with the prisoner, the second proceeding was a mistrial; but all the judges in the commission, except one, were of opinion that the objection was not valid.

§ 478. Blackstone laid down the rule that the jury cannot be discharged by the act of the judge, but he states it with this qualification — “unless in cases of evident necessity;”² a qualification not found in the rule as laid down by Coke, or in the resolution of the judges, as mentioned in the last section.

Under this qualification of the rule, it was found imperatively necessary on some occasions to discharge the jury, as in cases of the illness of a jurymen or of the prisoner, when a discharge of the jury could not be pleaded in bar on another trial.

When it was argued that the discharge of a jury without a verdict operated as an acquittal of the prisoner, the questions were asked by the judges, on the trial of *Winsor v. Queen*, “Suppose the court house took fire, and the judge, under the impression that the fire would reach where the court was sitting, discharged the jury?” and, “Suppose a juror fell down in a fit of epilepsy, and the judge, having never seen such a case, and no doctor being near, discharged the jury, under the mistaken notion that he was dead?” These questions were put to show that the rule as laid down by Blackstone must be qualified where there is an evident necessity for the discharge of the jury, such necessity being illustrated by the instances put by the judges.

§ 479. In cases of pressing necessity the jury could be *discharged* by the judge according to the rule thus established. But the next question that arose was, what this evident, pressing necessity should be, to justify a discharge of the jury in a criminal case without a verdict. It was impossible to enumerate in a rule such occasions as might likely occur, when this

¹ The term “charged,” as thus used, denotes the giving of the prisoner in charge to the jury for trial, and does not refer to the instructions given to the jury in the judge’s charge.

² 4 Bl. Com. 360.

necessity would exist; the most that could be done was to state the rule under this general qualification, leaving it to the judge to determine whether there was such a necessity to justify him discharging the jury. But under the system then practised of confining the jury without meat, drink, or fire until they were agreed, it would very rarely happen that a jury would fail to agree when a judge insisted on keeping them until they agreed; and in capital cases, the jury well knew that a continued difference of opinion, and an indulgence in conscientious scruples, only exposed them to the risk of starvation.

In cases of misdemeanor, however, there was not the same strictness, for in such cases the result of a disagreement was less serious. Accordingly, we find that judges discharged the jury in trials for misdemeanor, when, after long confinement, they failed to agree. Thus, in *Rex v. Cobbett*,¹ Lord Tenterden, on his own responsibility, discharged a jury on a trial for misdemeanor after they had been in deliberation fifteen hours. The right to discharge a jury in case of felony was doubted until lately in England.

§ 480. Two late cases in England have settled the law there as to the right of the court to discharge the jury in cases of misdemeanor and felony.

In *Regina v. Charlesworth*² the question came before the court as to the effect of a discharge of the jury without a verdict in case of misdemeanor.

In this case a witness for the crown refused to answer a question, and the court adjudged him guilty of contempt, fined and imprisoned him. The solicitor general, who conducted the case for the crown, then stated that it was impossible to proceed with the prosecution without the evidence of this witness, and asked the judge to discharge the jury instead of directing an acquittal for want of evidence. The jury were discharged accordingly. The prisoner put in a plea that a discharge of the jury in this manner operated as an acquittal. The case was thoroughly examined, the authorities reviewed, and the decision of the court was, that the discharge of the

¹ 3 Burn's Inst. by Bere & Chitty, 974.

² 1 B. & S. 460 (101 Eng. L.).

jury in this manner was not equivalent to an acquittal; but whether this would hold good in cases of treason or felony was left an open question.¹ Cockburne, C. J., in this case referred to the uncertainty that had hitherto existed as to the right to discharge a jury, saying: "I apprehend that in no part of our procedure has the practice of the courts more fluctuated than in relation to the practice of the discharge of the jury in criminal trials. If we go back to the authority of Lord Coke, he states in most positive and unqualified terms that 'a jury sworn and charged in case of life or member cannot be discharged by the court or any other, but they ought to give a verdict.' It is clear that does not embrace several of the cases in which it is admitted on all hands, that according to modern practice a jury may be discharged. Lord Coke notices neither the death nor the illness of a juror. . . . And if we go back to the period at which Lord Coke wrote, we see that the object of the coercion to which juries were then subjected was, by duress, to enforce unanimity. Hence, the practice even of taking juries in carts to the confines of the county,² and keeping them together for the purpose of compelling them to give a verdict, no matter at how much personal inconvenience and suffering, and not discharging them until the jurisdiction of the judge was at an end."

§ 481. The right to discharge in case of felony was not settled in England until the late case of *Winsor v. Queen*.³ This case, like the last, was learnedly examined, and in the opinions of the judges is found much instructive information regarding jury trials in former times. In this case, Charlotte Winsor was tried on an indictment for murder. The jury retired to consider their verdict late on Saturday evening, and were discharged, without having agreed, a little before mid-

¹ But while it was held that the discharge of the jury in this case could not avail the accused on a subsequent trial, the court considered that the exercise of the discretion in this case was not warranted, "unless, perhaps, it could be shown that the absence of evidence," on the part of the prosecution, "was occasioned by collusion between the witness and the accused." The decision of the question in this case was similar to that in *Regina v. Davidson*, 2 F. & F. 251.

² In *Norvell v. Duval*, 50 Mo. 272, it is held that a court has no right to have a jury carried from one county to another.

³ 6 B. & S. 141 (118 Eng. L.).

night of that evening, after being about five hours in deliberation. The judges who presided at the trial were obliged to depart the next morning (Sunday) to travel to an adjoining county to open the assizes on Monday morning. It was on this ground, it was alleged, the necessity existed for discharging the jury. The prisoner, when placed on trial a second time, pleaded the former discharge of the jury, and the question came before the court, as to the right to discharge the jury under these circumstances, and the effect of such discharge. The case was elaborately considered, and opinions were delivered by Cockburne, C. J., and Blackburne, Mellor, and Lush, JJ. All agreed in opinion that the discharge of the jury under the circumstances was a proper exercise of judicial discretion. Speaking of the different courses that were open to the judge to pursue in reference to the jury in this case, Cockburne, C. J., says: "The judge then had the choice of three courses, either to take the verdict on Sunday (which he doubted he could do), or to keep the jury in confinement until the Monday following, in the mean time allowing them necessary refreshment (which he doubted could be allowed), or to discharge them. These circumstances of great difficulty constituted a case in which the judge was called upon to exercise his discretion; and I am of opinion that he had the discretion to discharge the jury."

In this case the decision in *Conway v. The Queen*,¹ where it was held that in a case of felony a discharge of the jury after they had been twenty-four hours in deliberation was not proper, was dissented from, and the views of Mr. Justice Crampton, who dissented from the majority of the court in that case, were approved and adopted.

§ 482. The doctrine as thus held in England clearly establishes the right of the court in a case of misdemeanor or felony to discharge the jury without an agreement, when a necessity exists therefor, and that the court is to determine in its discretion whether such a necessity exists to justify a discharge of the jury. The exercise of this discretion is not subject to be reviewed on error, as was decided in the case last referred to. It is further decided that a discharge of the

¹ 7 Ir. Law, 149.

jury in the exercise of this discretion vested in the court does not prevent the prisoner being retried on the same indictment, and that he cannot in consequence plead that he was once in jeopardy. It was held in the case referred to that the maxim that no man can be put on his trial twice, means that a man is not to be put in peril a second time after a verdict pronounced on a good indictment; and that it does not follow that if the first trial has proved abortive, the question involved in the indictment shall not be submitted to a second jury.

VIEWS IN THE UNITED STATES.

§ 483. Right allowed in Ordinary Criminal Cases. — Of late there does not seem to be much difference of opinion in our States as to the right of the court to discharge a jury without a verdict in minor criminal cases as well as in civil causes.¹ But in regard to capital cases, the cases do not agree as to the exigency which will justify a discharge of the jury without a verdict.

§ 484. It was formerly held by many of the American courts that in capital cases it was no sufficient ground to warrant the discharge of a jury without the consent of the accused, when they were unable to agree upon a verdict; and that if a jury were discharged, without the prisoner's consent, before they had agreed, it constituted a bar to any further prosecution for the offence.² But in these cases it is admitted that there may be sometimes a necessity so invincible and uncontrollable as to justify the discharge of a jury in capital cases. In the case of *State v. Ephraim, Ruffin, C. J.*, said:

¹ In the following cases the discharge of the jury in a criminal case is held to be matter of discretion with the court: *People v. Green*, 13 Wend. 55, a trial on indictment for grand larceny; *People v. Denton*, 2 Johns. Cas. 275, an indictment for a misdemeanor; *People v. Olcott*, an indictment for a conspiracy; but in this case *Kent, J.*, questioned whether in a capital case the court could discharge the jury on the ground that they could not agree; *Hector v. State*, 2 Mo. 166. The question as to a discharge in a case of felony was settled in *People v. Goodwin*, 18 Johns. 188, where it was decided that in cases of felony or misdemeanor, or if the jury after deliberating so long as to exclude all reasonable expectation that they will be able to agree in a verdict unless compelled to do so by famine or exhaustion, may be discharged.

² *Commonwealth v. Clue*, 3 Rawle, 498; *State v. Ephraim*, 2 Dev. & Batt. 162; *Commonwealth v. Cook*, 6 S. & R. 577; *Williams v. Commonwealth*, 2 Gratt. 567; *McCauley v. State*, 26 Ala. 135.

"The jury cannot be discharged without the personal consent of the accused, but for some evident, urgent, overwhelming necessity, arising from matter accruing during the trial, and which was beyond human foresight and control; and generally speaking such necessity must be set forth in the record." In *Commonwealth v. Clue*, *supra*, Gibson, C. J., said: "The court may discharge the jury of a prisoner capitally indicted, only in case of absolute necessity, to establish which it is necessary that there be some other ingredient beside mere inability to agree."¹

§ 485. The necessity justifying a discharge may be variously estimated; for what one might consider to be a case of justifiable, uncontrollable necessity might by another be deemed capable of avoidance and control, and by no means insuperable.

In the case of *United States v. Haskell*² it is held that insanity in one of the jurors, appearing after the jury had been kept together three days, and more than twenty-four hours without refreshment, was good ground for discharging the jury in a capital cause, and that such discharge of the jury is in the discretion of the court and is no bar to further prosecution. In this case the grounds for the discharge of the jury were entered in form upon the record.

There could not possibly be any doubt of this being a case of extreme necessity; but what shall be done when jurors hold out in defiance of all pressure, against hunger, thirst, and confinement? Must the court wait until the obstinate fall disabled by the hardship of the situation, martyrs to the tenacity and strength of their opinions, before holding it necessary to discharge the jury?

If the views laid down in some of the cases be followed, it would seem bound to do so; for so long as the jury express themselves unable to agree, they should be incarcerated! The absurdity of carrying out the doctrine to this extreme has become generally apparent,³ and the view now obtains

¹ Where a jury, impanelled and sworn in a capital case, are discharged on account of the sickness of the presiding judge, the prisoner may be tried before a second jury for the same offence. *Nugent v. State*, 4 Stew. & P. 72.

² 4 Wash. C. C. 402.

³ After the jury, in a murder case, had been out seventeen hours, and had in-

that a necessity of that extreme and uncontrollable character exists to justify the discharge of the jury, when after a reasonable confinement, and after full instructions, the jury avow an utter inability to come to an agreement in respect to their verdict.

§ 486. The doctrine laid down in *United States v. Perez*,¹ by Judge Story, is more consonant to reason and good sense. It is there decided that the discharge of a jury from giving a verdict in a capital case, without the consent of the prisoner, when the jury are unable to agree, is not a bar to a subsequent trial for the same offence. Story, J., says: "The prisoner has not been convicted or acquitted, and may be again put upon his defence. We think in all cases of this nature the law has invested the courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, as the ends of public justice would otherwise be defeated. This rule is adopted in *People v. Goodwin*,² where the jury in a case of felony had been out seventeen hours, and were discharged within half an hour of the time when by law the court was bound to close its session. In the case of *People v. Green*³ the same rule is applied to a similar case, except that the jury were discharged after one half hour's deliberation, and when there was no restriction with regard to the time of the adjournment of the court, it being held as a matter entirely within the discretion of the court. In *Commonwealth v. Bowden*⁴ the jury had been confined together during part of a day and a whole night, and returned into court and informed the judge that they had not

formed the court that there was no likelihood of their agreeing, all the business of the term being finished, though the statute day of final adjournment had not arrived, the court discharged the jury. It was held that if, in its sound discretion, the court thought there was no probability that the jury would agree, the discharge was right, and the prisoner could again be put on trial. *Barrett v. State*, 35 Ala. 406.

¹ 9 Wheat. 579. See *U. S. v. Watson*, 3 Ben. 1; *Shaffer v. State*, 27 Ind. 131. The court may discharge a jury impanelled to try the issue in a criminal case, whenever it is necessary for the purpose of justice, and there is no exception of capital cases. *U. S. v. Coolidge*, 2 Gall. 364.

² 18 Johns. 188.

³ 13 Wend. 55.

⁴ 9 Mass. 494; *Commonwealth v. Purchase*, 2 Pick. 531.

agreed upon a verdict, and that it was not probable they ever could agree. One of the jurors was accordingly withdrawn, and the panel discharged, and the prisoner tried again, by another jury, during the same term, and convicted; and, on a motion in arrest of judgment, it was held to be within the power of the judge to discharge the jury. In two recent cases in Arkansas these views are adopted, and it is held competent for the court, when the jury cannot agree, to discharge them and hold the accused for trial on the same indictment by another jury." ¹ So, in *People v. Reagle*,² Talcott, J., says: "It is conceded at this day that the court may discharge a jury in case of necessity, in a criminal case, without furnishing a bar to a new trial. That the court in the exercise of its discretion is to judge of the necessity and propriety of the discharge, provided there be any facts on which such discretion may be exercised. It has repeatedly been held that a jury, having failed to agree, may be thus discharged."

§ 487. The Effect of the Discharge as claimed by some authorities was a virtual acquittal, on the ground that on the first trial the prisoner was once put in "jeopardy of life or limb," and that, therefore, under the Constitution of the United States, he could plead this in bar on another trial of the same indictment. But it is held here as in England, that a discharge of the jury because of some necessity therefor, is no bar to another trial on the same indictment, and that in such a case one cannot be said to have been once placed in jeopardy, which did not attach unless he has been either convicted or acquitted of the offence so that the facts will constitute a good plea of *autrefois acquit*, or *autrefois convict*, which is only true when there was both verdict and judgment shown.³

Cooley, in his work on Constitutional Limitations,⁴ says that "A person is in legal jeopardy when he is put upon his trial before a court of competent jurisdiction upon indictment

¹ *Lee v. State*, 26 Ark. 260; *McKenzie v. State*, Ibid. 334.

² 60 Barb. 527. The same is held in *State v. Matrassey*, 47 Mo. 295.

³ 4 Bl. Com. 335; 1 Chitt. C. L. 372; *Washington J.* in *U. S. v. Haskell*, 4 Wash. C. C. 402; *Spencer, C. J.*, in *People v. Goodwin*, 18 Johns. 188; *McKenzie v. State*, 26 Ark. 334; *Dobbins v. State*, 14 Ohio N. S. 493.

⁴ Page 326.

or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, and a jury is said to have been thus charged when they have been impanelled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution, and he cannot be deprived of this bar by the entering of a *nolle prosequi* against his will or by a discharge of the jury and continuance of the case." The discharge here referred to means an arbitrary discharge without a sufficient necessity therefor, which will be a good bar to a second trial for the same offence.¹

In the case of *State v. McKee*,² O'Neal, J., delivering the opinion, makes this inquiry: "We ask what is meant by jeopardy of his life? It is where one is put upon his trial upon a valid indictment for a capital offence. It may result in his condemnation, and hence he is in jeopardy. We are enabled to say that a jury, after they are charged, can be discharged, and the prisoner tried a second time for the following causes only: 1. The consent of the prisoner. 2. Illness of one of the jury, prisoner, or the court. 3. Absence of one of the jurymen. 4. The impossibility of agreeing on a verdict."

§ 488. In reference to the discharge of a juror after the trial has begun, against the objection of the prisoner, it has been decided that a prisoner in a capital case may thereby claim that he was once in jeopardy and thus obtain a release from any further prosecution on the same indictment. This has been decided in a late case in Kentucky.³ There the prisoner was indicted for murder. After the trial had begun, while a witness was being examined by the prosecution, one of the jurors announced from the jury box that he was a member of the grand jury that had found the indictment; thereupon

¹ 3 Whart. Cr. L. § 3128. Bishop (1 Crim. Law, § 874) speaks of the effect of an unauthorized discharge, which will be a sufficient bar to another trial for the same offence. Where the judge discharges the jury without the prisoner's consent; as, for example, "where, after the jury is sworn, the evidence is found not sufficient to convict; or a material witness for the prosecution appears to be absent; or such witness is shown to be unacquainted with the nature of an oath, and so to require instruction before testifying, or the witness is taken too ill to proceed — no second trial can be had."

² 1 Bailey, 651.

³ *O'Brian v. Commonwealth*, 9 Bush, 333.

the court of its own motion, and against the objections of the accused, discharged this juror and had another summoned in his stead. The trial then progressed, resulting in a verdict of guilty. It was held that the discharge of the juror without sufficient cause amounted to an acquittal, and that the plea of *autrefois acquit* to a further trial was good.

In *Stewart v. State*¹ a similar event happened, and the same point was considered. Here, also, after the trial had begun, a juror arose in open court and announced that he had been one of the grand jurors by whom the indictment was found; the court then inquired of the prisoner and his attorney if they objected to proceeding with the jury, and the response was that they did. Thereupon the court discharged the jury and had another impanelled. The prisoner claimed that having been once in jeopardy he was entitled to an acquittal, and upon an appeal when this question was made, Scott, J., said: "At that stage of the proceeding (the announcement made by the juror) the accused had the right to demand such a disposition of the case, either by verdict or otherwise, as would bar another prosecution for the same crime; of this he could not be deprived at the will of the court by the entry of a *nolle prosequi* or the discharge of the jury without an absolute necessity therefor. Such action taken without his consent would operate as an acquittal, and be a bar to any further or subsequent prosecution for the same offence. To hold otherwise would be to contravene the constitutional guarantee against being twice put in jeopardy for the same offence." An acquittal, however, was denied for the reason that the accused had objected to being tried by the juror.

§ 489. The juror may be discharged, if incompetent by reason of physical infirmity, or when he entertains opinions that manifestly unfit him for discharging impartially his duties as a juror. Thus, in *People v. Damon*² a juror was found in the panel, after the jury had been sworn, *but before any evidence was given*, who entertained conscientious scruples

¹ 15 Ohio N. S. 155. This was an indictment for the crime of stabbing with intent to kill.

² 13 Wend. 351.

against the death penalty, and it was held to be a proper exercise of discretion by the court to discharge him, even without the prisoner's consent. But the court in this case confined its ruling to the case where no evidence was given; thus making it quite a different question when the trial had been entered on and evidence had been given to the jury.

In the case of *Fletcher v. State*¹ it was held that the court has the power to discharge a juror from the jury box in a case of felony after he has been sworn, on the ground of physical inability, without the express consent of the prisoner.

§ 490. The result of the cases, in this country and in England, is, that a jury cannot be discharged in a capital case, and ought not to be in any criminal case, except upon the strict ground of necessity. The English courts, we have seen, hold that the judge before whom the trial is had is to determine in his discretion what constitutes such a necessity sufficient to justify a discharge of the jury, and this discretion is not subject to review on error. Our courts do not agree on this point, that the decision of the judge as to the necessity is a matter of fact which an appellate court will not review. Judge Redfield, in an excellent article in the *American Law Register*,² thus speaks of the practice here: "The English courts concur with a majority of the American courts that the question of necessity is one of fact, and that the decision of the court before whom the question first comes is final. This seems to us the only practicable rule upon the subject. For the disagreement of a jury which ought, we think, in all cases, civil or criminal, to be regarded as not being one of necessity for a discharge until pushed to the utmost limit of reasonable hope, or until the jury become desperate, or incapable of further effort, without unreasonable pressure and constraint, may nevertheless become a cause of real infallible necessity, as much as sickness or insanity; and it must then be treated in the same manner as any other necessity, and the court before whom the trial is had is the only proper tribunal

¹ 6 Humph. 249. The discharge of a jury, after they have heard the evidence and retired, in consequence of the sickness of one of the jurors, is not error on a trial for burglary. *Hector v. State*, 2 Mo. 166.

² Vol. 1, New Series, p. 524.

to determine this necessity, and their decision cannot be reversed on error, because in the nature of things it is impossible to state all the facts and circumstances in the case precisely as they appear in the court below. The discharge of the jury, therefore, in a criminal cause, ought not to be regarded as a bar to further prosecution, unless it appear clearly that it was for insufficient reasons and when no legal necessity existed in the case for such course, as was held in *State v. Waterhouse*.”¹

§ 491. The plea of *autrefois acquit* is not so available as it was formerly, since, as has been shown, courts are permitted to exercise a discretion in discharging a jury in certain circumstances. Yet it may, on some occasions, be properly pleaded, and will be effectual to prevent a retrial, when, on a former trial of the same charge, the jury were improperly discharged. Then it becomes necessary to inquire what is an improper unauthorized discharge of the jury which will enable the accused to offer this plea effectually? Unfortunately, no precise rules can be established to determine a subject which depends so often upon the exercise of discretion as controlled by circumstances attending each particular case.

If we first determine when a jury can be properly discharged without a verdict, we shall be in a better position to enable us to know when such a discharge will *not* be a bar to another trial on the same charge. In the previous sections it has been shown that the former strict rule of confining a jury and forcing a verdict from them, had been relaxed, and courts now recognize the propriety of discharging a jury on certain occasions. Bishop, after an examination of the subject, says: “The better view of this whole question may be stated as follows: Whenever, after a trial has commenced, whether for misdemeanor or for felony, the judge discovers any imperfection which will render a verdict against the defendant either void, or voidable by him, he may stop the trial, and what has been done will be no impediment in the way of any future proceedings. Whenever, also, anything appears showing plainly that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to

¹ *Mart. & Yerg.* 278.

exist; and, on making the adjudication matter of record, stop the trial with the like result as before. But without the adjudication, the stopping of the trial operates to discharge the prisoner. In other words, when the record shows the defendant to have been in actual jeopardy, he is protected thereby from further peril for the same alleged offence. But when it shows also, in addition to this, something which disproves the peril, it does not show the peril, whatever else it shows, and therefore it does not protect him."¹

This view is supported by the general current of authorities cited, and it will be seen to be in harmony with the result of the cases noted in a previous section.

The inference is, that the necessity, whatever it may be, must appear upon the record, and it must be *adjudged by the court, from proper evidence*, that such necessity existed, which made a discharge of the jury imperatively necessary. Hence, where it appeared that the necessity was not made apparent to the court, and was not properly adjudged to exist, and the jury were discharged, it was held that this was sufficient as a plea of *autrefois acquit* on a future trial of the same indictment.²

¹ 1 Crim. L. § 873.

² *People v. Cage*, 48 Cal. 323. In this case, the prisoner was tried for murder, and after the jury had been four days out, the court ordered the sheriff to proceed to the door of the jury room, and inquire if they had agreed upon a verdict, to which they replied that they "had not and could not agree on a verdict," and the sheriff thereupon reported the reply to the court. An order was then made adjourning the court for the term; though the term, by operation of law, did not expire until the evening of the following day. In view of these facts, it was held that the discharge of the jury in this manner operated as an acquittal, and the prisoner could properly plead it in bar of another trial for the same cause. The court say: "If the jury were in fact unable to agree, they should have been called into court, and have announced their inability in the presence of the court and of the defendant. In the absence of this, or some equivalent showing, the court was not authorized to make an order of discharge upon this ground." In *Ex parte McLaughlin*, 41 Cal. 211, the same court held that the discharge of the jury impanelled in a criminal case, without the consent of the defendant, because, after mature deliberation, they are unable to agree upon a verdict, is not an acquittal of the defendant, and does not entitle him to immunity from further prosecution for the same offence. But it was also held that the action of the court in discharging a jury in a criminal case, because of its inability to agree upon a verdict, is subject to review by the appellate court. This is evidently a sound principle to adopt, though we have seen in a former section that in England the exercise of the discretion of the court in discharging a jury is not open for examination. In North

Carolina, it is held that on the trial for an offence not capital, where the jury are unable to agree, it is within the discretion of the court to discharge them. *State v. Bullock*, 63 N. C. 570. But even in capital cases it is held in Virginia that the court has power for good cause to discharge the jury and put the accused upon his trial before a new jury. *Commonwealth v. Fell*, 9 Leigh, 613.

TABLE OF CASES.

A.

Aaron v. State, 37 Ala. 106, § 171.
Ablett v. Skinner, 1 Sid. 229, § 447.
Acerro v. Petroni, 1 Stark. 100, § 227.
Acton v. Eela, Salk. 662, § 419.
Adams v. Corriston, 7 Minn. 456, § 101.
 v. Funk, 53 Ill. 219, § 228.
 v. Harrold, 29 Ind. 198, § 227.
 v. Leland, 7 Pick. 62, § 310.
 v. Lindsdell, 1 B. & Ald. 681, § 290.
 v. People, 47 Ill. 376, § 394.
 v. Smith, 58 Ill. 419, § 338.
 v. State, 6 Eng. 446, § 200.
Adams Ex. Co. v. Haynes, 42 Ill. 89, § 285.
Adamson v. Rose, 30 Ind. 380, § 418.
Addington v. Etheridge, 12 Gratt. 436, § 300.
Ah Peen, Ex parte, Cal. Sup. Ct. § 109.
Albin v. Lord, 39 N. H. 196, § 289.
Aldrich v. Lyman, 6 R. I. 98, § 418.
Alexander v. Byers, 19 Ind. 301, § 292.
Alfred v. State, 37 Miss. 296, §§ 183, 185.
 v. State, 2 Swan, 581, § 185.
Algeo v. Duncan, 39 N. Y. 313, § 470.
Algier v. Maria, 14 Cal. 167, § 190.
Algur v. Gardner, 54 N. Y. 360, § 354.
Allard v. Lamirande, 29 Wis. 502, § 418.
Alleghany Co. v. Watts, 3 Barr, 464, § 67.
Allen v. Aldrich, 9 Fost. 63, § 457.
 v. Cowan, 23 N. Y. 502, § 268.
 v. Flock, 2 Penn. St. 159, § 413.
 v. State, 10 Ohio St. 287, § 365.
 v. State, 34 Tex. 230, § 433.
Allentown Bank v. Beck, 49 Penn. St. 394, § 268.
Allison v. Darton, 24 Mo. 343, § 446.
 v. People, 45 Ill. 37, § 408.
 v. State, 42 Ind. 354, § 326.
Allum v. Boulton, 18 Jur. 406, § 388.
Allyn v. R. R. Co. 105 Mass. 77, § 357.
Althorpe v. Wolfe, 22 N. Y. 355, § 324.
Ames v. Sloat, Wright, 577, § 445.
Amidon v. Gaff, 24 Ind. 128, § 439.
Amis v. Steamboat, 9 Mo. 621, § 301.

Amos v. Hughes, 1 M. & Rob. 464, § 212.
Anderson v. Green, 46 Geo. 361, § 410.
 v. State, 5 Ark. 445, §§ 130, 137.
 v. State, 14 Geo. 709, § 185.
 v. Steam Co. 64 N. C. 399, § 295.
Andrews v. Prichett, 66 N. C. 387, § 91.
Anon. 1 Bulstr. 163, § 420.
Antonie v. Ridge ('o. 23 Cal. 219, § 469.
Appleby v. Ins. Co. 45 Barb. 457, § 281.
Appleton v. Parker, 15 Gray, 173, § 292.
Apthorpe v. Comstock, 2 Paige, 482, § 92.
Archibald v. Argall, 53 Ill. 307, § 292.
 v. Davis, 4 Jones L. 138, § 305.
Armistead v. Commonwealth, 11 Leigh, 657, § 180.
Armstrong v. People, 37 Ill. 459, § 432.
 v. Pierson, 15 Iowa, 476, § 463.
 v. State, 1 Coldw. 338, § 80.
Arnold v. Norton, 25 Conn. 242, § 284.
Ash v. Marlow, 10 Ohio, 119, § 271.
Ashby v. Bates, 15 M. & W. 589, § 222.
Ashford v. Thornton, 1 B. & Ald. 405, § 22.
Atkins v. State, 16 Ark. 568, § 404.
Atkinson v. Allen, 12 Vt. 619, § 190.
 v. Gatcher, 23 Ark. 101, § 314.
Atlee v. Shaw, 4 Yeates, 236, § 73.
Attorney Gen. v. Good, 1 McCl. & You. 286, § 322.
Atwood v. Welton, 7 Conn. 66, § 245.
Aurora v. Cobb, 21 Ind. 492, § 212.
Austin v. Bingham, 31 Vt. 577, § 362.
Ayer v. Austin, 6 Pick. 225, § 212.
Ayrault v. Chamberlain, 33 Barb. 229 §§ 209, 214.

B.

Babcock v. Eckler, 24 N. Y. 625, § 268.
Backus v. Lebanon, 11 N. H. 19, § 104.

- Bacon v. Jones, 3 Jur. 994, § 94.
 Bailey v. Kimball, 26 N. H. 351, § 107.
 v. Trumbull, 31 Conn. 581, § 169.
 Bain v. Doran, 54 Penn. St. § 311.
 Baird v. Wolfe, 4 McLean, 549, § 306.
 Bakeman v. Rose, 18 Wend. 146, § 361.
 Baker v. Baker, 32 L. J. Pr. & Mat. 145, § 245.
 v. Gordon, 23 Ind. 204, § 103.
 v. Kelly, 41 Miss. 696, § 321.
 v. R. R. Co. 42 Ill. 73, § 421.
 v. Rand, 13 Barb. 152, § 464.
 v. State, 15 Geo. 498, §§ 183, 193.
 v. State, 23 Miss. 243, § 130.
 v. Steamboat, 14 Iowa, 214, § 130.
 v. Young, 44 Ill. 43, § 342.
 Ball v. Bruce, 21 Ill. 161, § 343.
 Baltimore, &c. R. R. Co. v. Christie, 5 W. Va. 325, § 202.
 Baltimore, &c. R. R. Co. v. Lafferty, 2 W. Va. 140, § 338.
 Baltimore R. R. Co. v. McWhinney, 36 Ind. 436, § 212.
 Baltimore, &c. R. R. Co. v. Realey, 14 Md. 424, § 338.
 Baltimore, &c. R. R. Co. v. State, 36 Ind. 366, § 295.
 Balzburgh v. Frazer, 21 Penn. St. 491, § 174.
 Bangor, &c. R. R. Co. v. McComb, 60 Me. 290, § 69.
 Bank v. Admr. 37 Ala. 227, § 275.
 v. Baldenwick, 45 Ill. 375, § 288.
 v. Davis, 6 W. & Serg. 285, § 227.
 v. Ezell, 10 Humph. 380, § 288.
 v. Hammer, 14 Mich. 212, § 275.
 v. Inloes, 7 Md. 380, § 300.
 v. Small, 26 Me. 136, § 470.
 v. Wilson, 14 Ark. 113, § 469.
 Bank of Missouri v. Anderson, 1 Mo. 244, § 98.
 Bank of Montgomery v. Plannett, 1 Ala. Sel. Cas. 178, § 321.
 Bankard v. Baltimore, &c. R. R. Co. 34 Md. 197, § 250.
 Banks v. Betts, 9 Bosw. 552, § 293.
 v. Booth, 6 Munf. 385, § 92.
 Banning v. Banning, 12 Ohio St. 437, § 220.
 Barber v. Marble, 2 Thomp. & C. 114, § 337.
 Barbour v. White, 37 Ill. 164, § 320.
 Barclay v. People, 8 Alb. L. J. 104, § 188.
 Barker v. Brink, 5 Clarke, 481, § 438.
 v. Justice, 41 Miss. 240, § 318.
 v. State, 48 Ind. 163, § 311.
 Barnes v. Brown, 69 N. C. 439, § 292.
 Barnes v. Strockhecker, 17 Geo. 340, §§ 415, 460.
 v. Williams, 11 Wheat. 415, § 438.
 Barney v. People, 22 Ill. 160, § 202.
 v. Schneider, 9 Wall. 248, § 355.
 v. State, 12 S. & M. 68, § 44.
 Barrett v. State, 14 Ohio St. 493, § 487.
 v. State, 1 Wis. 175, § 450.
 v. Wills, 4 Leigh, 114, § 415.
 Barrow v. Bailey, 5 Fla. 9, § 267.
 Barry v. Butlin, 1 Curteis, 637, § 220.
 Bartlett v. Smith, 11 M. & W. 483, §§ 309, 310.
 v. Tarbell, 12 Allen, 123, § 292.
 Barton v. Holmes, 16 Iowa, 252, § 407.
 v. Murray, 1 Penn. 97, § 132.
 v. St. Louis, &c. R. R. Co. 52 Mo. 253, § 294.
 Bass v. Hanson, 9 Iowa, 563, § 449.
 v. Irvin, 49 Geo. 436, § 455.
 Bassett v. Governor, 11 Geo. 207, § 169.
 v. Salisbury, 8 Fost. 438, § 348.
 Batchelder v. Moore, 42 Cal. 412, § 103.
 Bateman v. Ruth, 3 Daly, 378, § 298.
 Battre v. State, 18 Ala. 119, § 381.
 Baxter v. People, 3 Gilman, 368, §§ 184, 387.
 v. Putney, 37 How. Pr. 140, § 100.
 Bay v. Cook, 31 Ill. 336, § 267.
 Bayard v. Malcolm, 2 Johns. 550, § 420.
 Baynard v. Eddings, 2 Strobb. 374, § 305.
 Beach v. Raritan Co. 37 N. Y. 457, § 290.
 Beal v. Cunningham, 42 Me. 216, § 460.
 Beam v. Link, 27 Mo. 261, § 49.
 Bean v. Canning, 2 E. D. Smith, 419, § 292.
 Beatty v. Hatcher, 13 Ohio St. 115, § 129.
 v. Ins. Co. 52 Penn. St. 456, § 283.
 Beazley v. Dennison, 40 Tex. 416, § 220.
 Beckman v. McKay, 14 Cal. 250, § 356.
 Beckwith v. Carleton, 14 Geo. 691, § 416.
 Beckman v. Saratoga, &c. R. R. Co. 3 Paige, 45, § 104.
 Beers v. Beers, 4 Conn. 535, § 101.
 Belden v. Gray, 5 Fla. 504, § 292.
 Belknap v. Trimble, 3 Paige, 601, §§ 91, 94.
 v. Wendall, 1 Fost. 175, § 213.
 Bell v. Commonwealth, 8 Gratt. 600, § 56.
 v. Gray, 35 Ala. 209, § 339.
 v. Smith, 2 Johns. 98, § 279.
 v. State, 44 Ala. 393, § 113.

- Bell v. State*, 48 Ala. 684, § 428.
v. Woodward, 46 N. H. 315, § 305.
Bellair v. State, 6 Blackf. 104, § 47.
Benedict v. Haggin, 2 Cal. 385, § 344.
v. Lawson, 5 Ark. 514, § 472.
v. Martin, 36 Barb. 289, § 274.
Beneway v. Conyne, 3 Chand. 214, § 129.
Bennett v. Chamberlin, 26 Conn. 487, § 292.
v. Howard, 3 Day, 223, § 388.
v. Matthews, 40 How. Pr. 428, § 133.
v. Tennessee, Mart. & Yerg. 133, § 131.
Benoist v. Murrin, 58 Mo. 321, § 220.
Benton v. Jones, 8 Conn. 186, § 268.
Bergen v. Riggs, 34 Ill. 170, § 319.
Berkey v. Judd, 14 Minn. 394, § 93.
Berkshire Woollen Co. v. Proctor, 7 Cush. 417, § 285.
Bernhard v. R. R. Co. 1 Abb. App. Dec. 131, § 357.
Berry v. Billings, 47 Me. 328, § 301.
v. Elliott, 25 Ark. 89, § 473.
v. Kennedy, 5 B. Mon. 120, § 76.
v. State, 33 Geo. 98, § 250.
Bersch v. State, 13 Ind. 434, § 404.
Besson v. Southerd, 10 N. Y. 240, § 271.
Bevan v. Tomlinson, 25 Ind. 253, § 471.
Beverly v. Burke, 9 Geo. 440, § 289.
Bickham v. Pissant, Cox, 220, § 170.
v. Smith, 62 Penn. St. 45, § 413.
Biddle v. Commonwealth, 13 S. & R. 405, § 101.
Bigelow v. Rutland, 4 Cush. 247, § 298.
Bilbrough v. Ins. Co. 5 Duer, 587, § 281.
Bill v. People, 14 Ill. 432, §§ 250, 367.
Billings v. Billings, 2 Cal. 113, §§ 266, 474.
Birchard v. Booth, 4 Wis. 67, §§ 129, 406.
Bird v. State, 14 Geo. 43, § 143.
Birdsall v. Russell, 29 N. Y. 220, § 284.
Bishcp v. Cook, 13 Barb. 326, § 267.
Bixbie v. State, 6 Ohio, 86, § 164.
Black v. Camden, &c. R. R. Co. 45 Barb. 40, § 227.
v. Lamb, 1 Beasley, 108, § 91.
v. Shreve, 2 Beasley, 455, § 91.
Blackburne v. Beall, 21 Md. 208, § 340.
Blackley v. Sheldon, 7 Johns. 32, § 452.
Blackwell v. Fosters, 1 Met. (Ky.) 88, § 287.
Blake v. Davis, 20 Ohio, 231, § 438.
v. Millspaugh, 1 Johns. 316, § 183.
Blalock v. Phillips, 38 Geo. 216, § 388.
Blanchard v. Brown, Wallace, Jr. 309, § 75.
Blanchard v. Colburn, 16 Mass. 345, § 473.
v. Pratt, 37 Ill. 240, § 289.
Bland v. People, 3 Scam. 364, § 337.
Blankman v. Vallejo, 15 Cal. 638, § 363.
Blemer v. People, 76 Ill. 265, § 138.
Bloom v. State, 20 Geo. 443, § 120.
Bloomhuff v. State, 8 Blackf. 205, § 433.
Blot v. Boiceau, 3 N. Y. 78, § 343.
Blum v. Pate, 20 Cal. 69, § 462.
Board v. Heenan, 2 Minn. 330, § 300.
Boardman v. Ins. Co. 20 N. H. 551, § 281.
v. Woodman, 47 N. H. 120, § 220.
Bodwell v. Osgood, 3 Pick. 379, § 270.
Boehm v. Great W. R. R. Co. 34 Barb. 256, § 298.
Boetge v. Lander, 20 Tex. 105, § 409.
Boggs v. State, 45 Ala. 30, § 140.
Boisliniere v. Board Co. Commrs. 32 Mo. 375, § 64.
Bok v. Vincent, 12 Abb. Pr. 137, § 231.
Boland v. Missouri R. R. Co. 36 Mo. 484, § 296.
Boles v. State, 24 Miss. 445, §§ 139, 154.
v. State, 13 Sm. & M. 398, § 396.
Bolling v. Mayor, 3 Rand. 5, § 437.
Bolster v. Cummings, 6 Greenlf. 85, § 457.
Bond v. People, 39 Ill. 26, §§ 316, 424.
Bonfanti v. State, 2 Minn. 123, § 211.
Bonfield v. Smith, 2 M. & Rob. 519, § 212, 215.
Booby v. State, 4 Yerg. 111, § 392.
Boon v. State, 1 Kelly, 631, §§ 153, 187.
Boose v. State, 10 Ohio St. 575, § 200.
Booth v. Barnum, 9 Conn. 286, § 284.
v. Bunce, 33 N. Y. 139, § 268.
v. Commonwealth, 16 Gratt. 519, § 44.
Boren v. Bartleson, 39 Ill. 43, §§ 467, 470.
Boring v. Williams, 17 Ala. 510, § 51.
Borough of Harrisburgh v. Crangle, 3 W. & S. 460, § 447.
Bosworth v. Sturtevant, 2 Cush. 392, § 421.
Bourke v. James, 4 Mich. 336, § 287.
Bovill v. Primm, 36 Eng. L. & Eq. 441, § 300.
Bowditch v. Soltyk, 99 Mass. 136, § 325.
Bowen v. Spears, 20 Ind. 146, § 214.
Bowie v. Brake, 3 Duer, 35, § 289.
Bowler v. State, 41 Miss. 571, § 332.
Bowles v. Sharp, 4 Bibb, 550, § 447.
Bowman v. Bowman, 2 M. & Rob. 501, § 227.
v. Middleton, 1 Desaus. 159, § 92.

- Boyce v. California Stage Co. 25 Cal. 460, § 339.
 Boyd v. Boyd, 66 Penn. St. 293, § 220.
 v. Brotherson, 10 Wend. 93, § 290.
 Boykin v. Dohlond, 37 Ala. 577, § 367.
 Boyle v. Wiseman, 10 Exch. 647, § 244.
 Boynton v. Trumbull, 45 N. H. 408, § 407.
 Bradbury v. Falmouth, 18 Me. 65, § 248.
 Bradford v. R. R. Co. 7 Rich. (S. C.) 201, § 301.
 v. State, 15 Ind. 347, §§ 115, 170, 185.
 Bradley v. Bevington, 4 Drew. 511, § 94.
 v. Bradley, 45 Ind. 67, § 142.
 Bradshaw v. Hubbard, 1 Gilm. 390, § 170.
 Brady v. Little, 21 Geo. 132, § 367.
 Brakefield v. State, 1 Sneed, 215, § 183.
 Branch v. Wilson, 12 Fla. 543, § 472.
 Brandford v. Freeman, 5 Exch. 734, § 222.
 Brandon v. People, 42 N. Y. 265, § 242.
 Brannan v. Force, 12 B. Mon. 506, § 415.
 Brand v. Fowler, 7 Cow. 562, § 400.
 Brassfield v. Brown, 4 Rich. 298, § 471.
 Bray v. State, 41 Tex. 560, § 202.
 Brazier v. State, 44 Ala. 387, § 126.
 Breck v. Blanchard, 7 Fost. 100, § 462.
 Breeding v. State, 11 Tex. 257, § 118.
 Breen v. People, 4 Park. Cr. 380, § 336.
 Breeze v. State, 12 Ohio St. 146, § 315.
 Brennan v. People, 15 Ill. 511, § 425.
 v. Security, &c. Ins. Co. 4 Daly, 296, § 212.
 Brent v. Dold, Gilmer, 211, § 92.
 Brett v. Catlin, 47 Barb. 404, § 364.
 Bridenthal v. Davidson, 61 Ill. 460, § 356.
 Bridge v. Austin, 4 Mass. 79, § 470.
 Brinckley v. Brinckley, 56 N. Y. 192, §§ 91, 94.
 Brister v. State, 26 Ala. 107, §§ 164, 454.
 Brittain v. Allen, 2 Dev. 120, §§ 169, 175.
 Britton v. Fox, 39 Ind. 369, § 453.
 Brock v. King, 3 Jones L. 504, § 305.
 Brook v. Grand Trunk R. R. Co. 15 Mich. 332, § 320.
 v. Montague, Cro. Jac. 90, § 255.
 Brooks v. Barrett, 7 Pick. 94, § 220.
 v. Elgin, 6 Gill, 254, § 285.
 v. Powers, 13 Mass. 244, § 268.
 Brotherline v. Swires, 48 Penn. St. 69, § 269.
 Brower v. Hill, 1 Sandf. 629, § 283.
 Brown v. Bellows, 4 Pick. 179, § 230.
 v. Burke, 22 Geo. 574, § 89.
 Brown v. Commonwealth, 73 Penn. St. 321, § 124.
 v. Frost, 2 Bay, 126, § 107.
 v. Griffiths, 11 Ohio St. 329, § 220.
 v. Hillegas, 2 Hill, 447, § 446.
 v. Huger, 21 How. 305, § 300.
 v. La Crosse City, &c. Co. 21 Wis. 51, § 116.
 v. Meredith, 2 Roll. Abr. 703, § 447.
 v. R. R. Co. 11 Cush. 97, § 285.
 v. State, 5 Eng. 613, §§ 48, 133, 423.
 v. State, 7 Eng. 623, § 130.
 v. State, 28 Geo. 439, § 174.
 v. State, 16 Ind. 496, § 113.
 v. Webb, 20 Ohio, 389, § 267.
 v. Wheeler, 18 Conn. 199, § 177.
 v. Willey, 42 Penn. St. 205, § 305.
 Brownell v. McEwen, 5 Denio, 367, § 408.
 Brownfield v. Brownfield, 12 Penn. St. 136, § 305.
 Browning v. Skillman, 4 Zab. 351, § 418.
 Brush v. Kohn, 9 Bosw. 589, § 464.
 Bryan v. State, 4 Iowa, 349, § 101.
 v. Wear, 4 Mo, 106, § 321.
 Bryant v. Kelton, 1 Tex. 415, § 268.
 Buckingham v. Payne, 36 Barb. 81, § 298.
 Buckley v. Garrett, 47 Penn. St. 204, § 282.
 Bucklin v. Thompson, 1 J. J. Marsh. 223, § 267.
 Buffalo, &c. R. R. Co. v. Ferris, 26 Tex. 588, § 104.
 Bulkley v. R. R. Co. 27 Conn. 479, § 298.
 v. Smith, 2 Duer, 261, § 271.
 Bullard v. Shore, 2 Cow. 430, § 398.
 Bullock v. State, 10 Geo. 47, § 427.
 v. Narrott, 49 Ill. § 305.
 v. Smith, 15 Geo. 395, § 250.
 Bunn v. Hoyt, 3 Johns. 255, § 462.
 Burch v. Smith, 15 Tex. 19, § 268.
 Burdine v. Grand Lodge, &c. 37 Ala. 478, § 169.
 Burgess v. Commonwealth, 2 Virg. Cas. 483, § 60.
 v. Purvis, 1 Burr. 326, § 447.
 Burhans v. Tibberts, 7 How. Pr. 21, § 464.
 Burk v. Clark, 8 Fla. 9, § 201.
 v. State, 2 Harr. & J. 426, § 143.
 Burkett v. Lanata, 15 La. An. 337, § 341.
 Burlingame v. Burlingame, 16 Wis. 285, § 449.
 v. Burlingame, 18 Wis. 285, § 125.

- Burnham v. Allen, 1 Gray, 496, § 212.
 v. Ayer, 35 N. H. 351, § 300.
 Burns v. Kelley, 41 Miss. 339, § 314.
 v. Legrange, 17 Tex. 415, § 97.
 v. People, 1 Park. Cr. 182, § 430.
 Burr v. Todd, 41 Penn. St. 214, § 269.
 v. Williams, 20 Ark. 171, § 316.
 Burrell v. State, 18 Tex. 713, § 368.
 Burritt v. Ins. Co. 5 Hill, 188, § 280.
 Burrough v. Martin, 2 Campb. 112, § 229.
 Burroughs v. Langley, 10 Md. 248, § 292.
 v. State, 33 Geo. 403, § 173.
 Burton v. Anderson, 1 Tex. 93, § 415.
 v. Ehrlich, 15 Penn. St. 236, § 130.
 v. Plummer, 2 A. & El. 343, § 229.
 Butler v. Ricketts, 12 Iowa, 107, § 314.
 v. Thomason, 11 B. Mon. 235, § 325.
 Butterfield v. R. R. Co. 10 Allen, 532, § 294.
 Buttram v. Jackson, 32 Geo. 409, § 316.
 Buxendin v. Sharp, Salk. 662, § 420.
 Byers v. Commonwealth, 6 Wright, 89, §§ 87, 95.
 Byrd's case, 1 How. (Miss.) 163, § 106, 115.
 Byrne v. Byrne, 3 Tex. 336, § 301.
 v. Grossman, 65 Penn. St. 310, § 465.
 C.
 Cahoon v. Levy, 5 Cal. 294, § 90.
 Cain v. Ingham, 7 Cow. 478, § 174.
 Calder v. Rutherford, 3 B. & B. 302, § 216.
 Caldwell v. State, 41 Tex. 86, § 118.
 Call v. Gray, 37 N. H. 428, § 267.
 Callahan v. Bean, 9 Allen, 557, § 297.
 v. Warne, 40 Mo. 131, § 352.
 Callanan v. Shaw, 24 Iowa, 451, § 364.
 Calvin v. Warford, 20 Md. 357, § 344.
 Camp v. Phillips, 42 Geo. 289, § 312.
 Campan v. City of Detroit, 14 Mich. 276, § 104.
 Campbell v. Beckett, 8 Ohio St. 210, § 348.
 v. Ins. Co. 98 Mass. 381, § 281.
 v. R. R. Co. 23 Ohio St. 168, § 287.
 v. Rusch, 9 Iowa, 337, § 284.
 v. Skidmore, 1 Tex. 475, § 409.
 v. State, 48 Geo. 353, § 118.
 v. State, 9 Yerg. 333, § 425.
 Cancemi v. People, 18 N. Y. 128, §§ 76, 118, 183, 451.
 Candler v. Hammond, 23 Geo. 493, § 303.
 Cane v. People, 3 Neb. 357, §§ 337, 394.
 Cannam v. Farmer, 2 C. & Kir. 746, § 212.
 Cannell v. Phoenix Ins. Co. 59 Me. 582, § 228.
 Canon v. State, 3 Tex. 31, § 410.
 Carnal v. People, 1 Park. Cr. 272, § 194.
 Carpenter v. Nixon, 5 Hill, 260, § 96.
 v. People, 8 Barb. 610, § 378.
 v. People, 4 Scam. 197, § 431.
 v. State, 4 How. (Miss.) 163, § 113.
 v. Ward, 30 N. Y. 243, § 245.
 Carpentier v. Thistson, 24 Cal. 268, § 300.
 Carrington v. People, 6 Park. Cr. § 336.
 v. Smith, 8 Pick. 419, § 267.
 Carson v. Osborn, 10 B. Mon. 155, § 437.
 Carter v. Grinnella, 67 Ill. 270, § 266.
 v. Peck, 4 Sneed, 208, § 343.
 v. State, 37 Tex. 362, § 309.
 v. State, 20 Wis. 647, § 432.
 Caruthers v. Caruthers, 38 Geo. 75, § 292.
 Carver v. Louthain, 38 Ind. 530, § 362.
 Caskey v. Lewis, 15 B. Mon. 27, § 214.
 Castro v. Gill, 6 Cal. 40, § 289.
 Catawissa R. R. Co. v. Armstrong, 52 Penn. St. 282, § 296.
 Caw v. People, 3 Neb. 357, § 314.
 Chalmers v. Shackell, 6 C. & P. 475, § 335.
 Chamberlain v. Enfield, 43 N. H. 356, § 288.
 v. Gaillard, 26 Ala. 504, § 213.
 Chambers v. Brigham, 68 N. C. 274, § 252.
 Chandler v. Ferris, 1 Harring. 460, § 220.
 v. Von Raeder, 24 How. 224, § 289.
 Chapin v. Potter, 1 Hilton, 366, § 303.
 Chapman v. R. R. Co. 26 Wis. 295, § 348.
 v. Searle, 3 Pick. 38, § 291.
 Chappel v. State, 8 Yerg. 166, § 59.
 Chappell v. Allen, 38 Mo. 213, § 319.
 Charles Riv. Bridge v. Warren Bridge, 7 Pick. 369, § 94.
 Charlotte v. Chouteau, 25 Mo. 465, § 300.
 Chase v. Jennings, 38 Me. 44, § 174.
 v. People, 40 Ill. 352, §§ 178, 211.

- Chase v. State*, 1 Spencer, 218, § 45.
Chatterton v. People, 15 Abb. Pr. 147, § 433.
Chenery v. Palmer, 6 Cal. 119, § 266.
Chesapeake Bank v. Swain, 29 Md. 483, § 292.
Chesley v. Chesley, 37 N. H. 236, § 212.
Cheswell v. Chapman, 42 N. H. 47, § 418.
Chevellier v. Brewer, 6 Tex. 398, § 473.
Chicago v. Adler, 56 Ill. 344, § 229.
 v. Smith, 48 Ill. 107, § 364.
Chicago, &c. R. R. Co. v. Becker, 76 Ill. 25, § 297.
Chicago, &c. R. R. Co. v. Buttolf, 66 Ill. 347, § 196.
Chicago, &c. R. R. Co. v. Fillmore, 57 Ill. 265, § 341.
Chicago, &c. R. R. Co. v. Griffin, 68 Ill. 499, § 316.
Chicago, &c. R. R. Co. v. Jackson, 55 Ill. 492, § 341.
Chicago, &c. R. R. Co. v. Patten, 64 Ill. 510, § 294.
Chicago, &c. R. R. Co. v. Pondrom, 51 Ill. 333, § 294.
Chichester v. Whiteleather, 51 Ill. 259, § 316.
Chickasaw Co. v. Pitcher, 36 Iowa, 593, § 346.
Chidoteau v. Dominquez, 7 Mart. 521, § 412.
Chittenden v. Evans, 48 Ill. 52, § 464.
Chouteau v. Pierre, 9 Mo. 3, § 179.
Church v. Freeman, 16 How. Pr. 294, § 93.
 v. Gilman, 15 Wend. 656, § 291.
Churchill v. Churchill, 12 Vt. 661, § 174.
Chute v. State, 19 Minn. 271, § 229.
Citizens Ins. Co. v. Marsh, 41 Penn. St. 386, § 283.
City of Chicago v. Langlass, 66 Ill. 361, § 451.
 v. Rogers, 61 Ill. 188, § 450.
Clafin v. Rosenberg, 42 Mo. 439, § 321.
Claiborne v. Tanner, 18 Tex. 68, § 437.
Clark v. Bigelow, 4 Shepl. 246, § 228.
 v. Commonwealth, 29 Penn. St. 129, § 126.
 v. Davis, 7 Tex. 556, § 202.
 v. Dutcher, 9 Cow. 674, § 325.
 v. Hannibal, &c. R. R. Co. 36 Mo. 202, § 107.
 v. Ins. Co. 40 N. H. 333, § 280.
 v. Lamb, 8 Pick. 415, § 464.
 v. R. R. Co. 36 Mo. 202, § 351.
 v. Robinson, 5 B. Mon. 563, § 369.
Clark v. State, 35 Geo. 75, § 331.
 v. State, 1 Ind. 253, § 54.
Clarke v. Hammerle, 27 Mo. 55, § 319.
 v. Marriott, 9 Gill, 331, §§ 290, 300.
Clarkson v. Edge, 10 Jur. N. S. 871, § 90.
Clay v. State, 43 Ala. 350, § 437.
Cleage v. Hyden, 6 Heisk. 73, § 169.
Cleave v. Jones, 21 L. J. Ex. 106, § 308.
Clem v. State, 31 Ind. 480, § 345.
Clemenson v. Chandler, 4 Kan. 558, § 93.
Clement v. Brooks, 13 N. H. 92, § 242.
 v. Bushway, 25 Ill. 200, § 472.
Clements v. Benjamin, 12 Johns. 299, § 107.
Cleveland, &c. R. R. Co. v. Bartram, 11 Ohio St. 457, § 342.
Cleveland, &c. R. R. Co. v. Crawford, 24 Ohio St. 631, § 295.
Cleveland, &c. R. R. Co. v. Stanley, 7 Ohio St. 155, §§ 73, 75.
Cleveland, &c. R. R. Co. v. Terry, 8 Ohio St. 570, § 357.
Cliquot's Champagne, 3 Wall. 115, § 274.
Cloon v. Gerry, 13 Gray, 202, §§ 270, 271.
Close v. Olney, 1 Denio, 319, § 244.
 v. Samm, 27 Iowa, 503, § 370.
Closson v. Staples, 42 Vt. 209, § 270.
Clough v. Clough, 6 Fost. 24, § 461.
Cluff v. Ins. Co. 13 Allen, 308, § 283.
Clum v. Smith, 5 Hill, 560, § 408.
Cobb v. Wallace, 5 Coldw. 540, § 302.
Cochran v. State, 7 Humph. 544, §§ 394, 410.
 v. Toher, 14 Minn. 385, § 288.
Cocke v. Upshan, 6 Munf. 464, § 92.
Cody v. State, 3 How. (Miss.) 27, § 48.
Coffin v. Gephart, 18 Iowa, 256, § 404.
 v. Ins. Co. 15 Pick. 295, § 359.
Cogswell v. State, 49 Geo. 104, § 387.
Cohron v. State, 20 Geo. 752, § 173.
Coice v. State, 31 Geo. 424, § 328.
Coit v. Wapples, 1 Minn. 134, §§ 413, 463.
Cole v. Curtis, 16 Minn. 182, § 271.
 v. Perry, 6 Cow. 584, § 130.
 v. Swan, 4 Greene, 32, § 390.
 v. Tucker, 6 Tex. 266, § 343.
Coleman v. Clements, 23 Cal. 255, § 302.
 v. Craysdale, 3 J. J. Marsh 541, § 419.
 v. Roberts, 1 Mo. 97, § 325.
 v. Wolcott, 4 Day, 388, § 310.
Coleman's case, 2 City H. Rec. 89, § 175.
Colgan v. Aymar, Hill & Denio, 28 § 274.

- Collier v. State*, 20 Ark. 36, § 389.
Collins Co. v. Marcy, 25 Conn. 42, § 284.
Colman v. Dixon, 50 N. Y. 572, § 91.
Colt v. Eves, 12 Conn. 243, §§ 51, 83, 120, 125.
Colton v. Ross, 2 Paige, 396, § 92.
Columbian Ins. Co. v. Askley, 4 Pet. 139, § 279.
Commercial Bank v. Jones, 18 Tex. 812, § 276.
Com'th v. Adock, 8 Gratt. 661, § 60.
 v. Annis, 15 Gray, 197, § 336.
 v. Austin, 7 Gray, 51, §§ 140, 179.
 v. Berry, 5 Gray, 93, § 434.
 v. Billings, 97 Mass. 405, § 241a.
 v. Bowden, 9 Mass. 494, § 486.
 v. Boyle, 9 Phil. 592, § 451.
 v. Buzzell, 16 Pick. 153, §§ 179, 197, 245.
 v. Carter, 2 Virg. Cas. 319, § 171.
 v. Chatham, 5 Penn. St. 181, § 441.
 v. Chauncey, 2 Ash. 90, § 136.
 v. Child, 10 Pick. 252, § 322.
 v. Clark, 2 Browne, 323, § 47.
 v. Clark, 6 Gratt. 675, § 56.
 v. Clue, 3 Rawle, 498, § 484.
 v. Cook, 6 S. & R. 577, §§ 433, 484.
 v. Cooper, 19 Pick. 479, § 431.
 v. Costley, 118 Mass. 1, § 465.
 v. Crans, 3 Penn. L. J. 453, § 51.
 v. Cunningham, 104 Mass. 545, § 209.
 v. Dailey, 12 Cush. 80, § 113.
 v. Drum, 19 Pick. 479, § 429.
 v. Eagan, 4 Gray, 18, § 169.
 v. Eddy, 7 Gray, 583, § 211.
 v. Fell, 9 Leich. 613, § 491.
 v. Foran, 110 Mass. 179, § 323.
 v. Gable, 7 S. & R. 423, § 429.
 v. Gee, 6 Cush. 174, § 144.
 v. Gibson, 2 Va. Cas. 70, §§ 452, 461.
 v. Gleason, 110 Mass. 66, § 58.
 v. Goodhue, 2 Met. 193, § 431.
 v. Gore, 3 Dana, 474, § 55.
 v. Green, 1 Ash. 289, § 136.
 v. Gross, 1 Ashm. 281, § 193.
 v. Guild, Thach. Cr. Cas. 329, § 385.
 v. Harman, 4 Barr, 269, §§ 64, 379.
 v. Hawkins, 3 Gray, 465, § 211.
 v. Hayden, 4 Gray 18, § 139.
 v. Hill, 4 Allen, 591, § 189.
 v. Howe, 13 Gray, 26, § 423.
 v. James, 1 Pick. 375, § 60.
Com'th v. Johnson, Thach. Cr. Cas. 284, § 59.
 v. Joliffe, 7 Watts, 585, §§ 160, 177.
 v. Kimball, 7 Met. 304, § 217.
 v. Knapp, 10 Pick. 579, § 144.
 v. Lawrence, 9 Gray, 135, § 377.
 v. Lippard, 6 S. & R. 395, § 154.
 v. Mahar, 16 Pick. 120, § 60.
 v. Manson, 2 Ashm. 31, § 434.
 v. Marrow, 3 Brews. 402, § 455.
 v. McCaul, 1 Va. Cas. 271, § 396.
 v. McKie, 1 Gray, 61, § 211.
 v. Murphy, 10 Gray, 1, § 251.
 v. Odell, 3 Pittsb. (Pa.), 449, § 265.
 v. O'Neil, 6 Gray, 343, § 169.
 v. Porter, 10 Met. 263, §§ 251, 377.
 v. Prophet, 1 Browne, 135, § 130.
 v. Pullman, 3 Bush, 47, § 49.
 v. Purchase, 2 Pick. 521, § 486.
 v. R. R. Co. 10 Allen, 189, § 298.
 v. Roby, 12 Pick. 496, §§ 396, 401, 465.
 v. Rogers, 7 Met. 501, § 211.
 v. Rogers, 7 Met. 510, § 165.
 v. Ryan, 5 Mass. 90, § 169.
 v. Sallager, 3 Pa. L. Journ. 518, § 387.
 v. Sargent, Thacher's Cr. Cas. 116, § 58.
 v. Smith, 9 Mass. 107, § 47.
 v. Sprague, 3 R. I. 205, § 472.
 v. State, 3 Tex. 31, § 396.
 v. Thompson, 8 Gratt. 637, § 402.
 v. Thrasher, 11 Gray, 57, § 183.
 v. Vansyckle, Brightly, 73, § 379.
 v. Van Tuyle, 1 Met. 1, § 380.
 v. Webster, 5 Cush. 295, §§ 165, 178, 187, 331.
 v. Wood, 12 Mass. 313, § 433.
 v. York, 9 Met. 93, §§ 270, 331.
Comstock v. Hadlyme, 8 Conn. 261, § 212.
 v. Savage, 27 Conn. 184, § 292.
 v. Smith, 26 Mich. 306, § 346.
Conger v. Hudson, &c. R. R. Co. 6 Duer, 375, § 288.
Conkey v. Northern Bank, 6 Wis. 447, § 149.
 v. People, 1 Abb. App. Dec. 418, § 427.
 v. People, 5 Park. Cr. 31, § 44.
Conkling v. Shelley, 28 N. Y. 360, § 266.
Conn. Ins. Co. v. Cross, 18 Wis. 109, § 93.

- Connehan v. Ford*, 9 Wis. 242, § 306.
Conner v. State, 25 Geo. 515, § 134.
 v. State, 4 Yerg. 137, § 136.
Conrad v. Williams, 6 Hill, 444, § 363.
Conway v. Queen, 7 Ir. L. 149, § 481.
Cook v. Bennett, 51 N. H. 85, § 308.
 v. Ritter, 4 E. D. Smith, 253, § 250.
 v. State, 26 Geo. 593, § 457.
 v. Whitfield, 41 Miss. 541, § 317.
Cook's Lessee v. Carroll, 6 Md. 104, § 300.
Cooper v. Bissell, 13 Johns. 318, § 464.
 v. Maupin, 6 Mo. 424, § 418.
Copenhagen v. State, 14 Geo. 22, § 192.
Coppage v. Commonwealth, 3 Bush, 532, § 350.
Corbett v. Gilbert, 24 Geo. 454, § 463.
Corlies v. Little, 14 N. J. L. 373, § 472.
Cornelius v. Giberson, 1 Dutch. 31, § 289.
Corning v. Troy Factory, 44 N. Y. 577, § 352.
Corn v. Tompkins, 17 Geo. 351, § 840.
Cory v. Silcox, 6 Ind. 39, § 251.
Coryell v. Colbaugh, Cox, 77, § 343.
Costigan v. Cuyler, 21 N. Y. 134, § 193.
 v. Mohawk, &c. R. R. Co. 2 Denio, 609, § 212.
Cottle v. Cottle, 6 Me. 140, § 392.
Cotton v. State, 31 Miss. 504, § 183.
Couch v. State, 24 Tex. 557, § 473.
Courtwright v. Strickler, 37 Iowa, 382, § 170.
Cowjill v. Wooden, 2 Blackf. 332, § 134.
Cowperwaite v. Jones, 2 Dall. 55, § 407.
Cox v. Freedley, 33 Penn. St. 124, § 300.
 v. Huines, 1 Penn. 687, § 132.
 v. State, 32 Geo. 515, § 319.
 v. Vickers, 35 Ind. 27, § 212.
Coykendall v. Eaton, 42 How. Pr. 378, § 275.
Crabtree v. State, 3 Sneed, 302, § 407.
Craft v. Commonwealth, 24 Gratt. 602, § 170.
Craig v. Andrews, 7 Clarke, 17, § 303.
 v. Fenn, 41 Eng. C. L. 29, § 169.
Crandall v. People, 2 Lans. 309, § 252.
Crane v. Dygert, 4 Wend. 675, § 130.
Crawford v. State, 2 Yerg. 408, § 410.
 v. Wolf, 29 Iowa, 567, § 473.
Creed v. Fisher, 18 Jur. 228, §§ 75, 155.
 v. Hartman, 29 N. Y. 591, § 421.
Creiger v. Bunton, 2 Strobb. 487, § 162.
Crittenden v. Field, 8 Gray, 626, § 91.
Crittenden, Ex parte, 1 Hemp. 176, § 57.
Criminalin v. Minter, 9 Ala. 594, § 447.
Cropper v. State, 1 Morris, 259, § 445.
Cross v. Garrett, 35 Iowa, 480, § 252.
Crouch v. Martin, 3 Blackf. 256, § 446.
Crouse, Ex parte, 4 Whart. 11, § 108.
Crow v. State, 23 Ark. 685, § 342.
Crowther v. Oldfield, Salk, 365, § 420.
Crump v. Mining Co. 7 Gratt. 369, § 269.
Crusen v. State, 10 Ohio St. 258, § 454.
Cullum v. Wagstaff, 48 Penn. St. 304, § 304.
Culver v. Banning, 19 Minn. 303, § 303.
Cumberland, &c. Co. v. Scally, 27 Md. 589, § 338.
Cumberland, &c. Ins. Co. v. Mitchell, 48 Penn. St. 374, § 281.
Cummings v. Gann, 52 Penn. St. 484, § 177.
Cunningham v. Patton, 6 Barr, 355, § 289.
Curcier v. Ins. Co. 5 S. & R. 113, § 279.
Card v. Commonwealth, 14 B. Mon. 310, § 433.
Curtis v. Ayrault, 47 N. Y. 73, § 302.
 v. Gill, 34 Conn. 55, §§ 99, 100.
 v. Wheeler, 4 C. & P. 196, § 213.
Curry v. Schmidt, 54 Mo. 515, § 301.
Cutler v. Hurbert, 29 Wis. 152, § 352.
Cyphers v. People, 31 N. Y. 373, § 46.

D.

- Daily v. State*, 4 Ohio St. 57, § 112.
Dale v. Dean, 16 Conn. 579, § 419.
 v. Roosevelt, 2 Johns. Ch. 255, § 91.
Dalton v. Clough, 50 Ill. 47, § 472.
Dana v. Farrington, 4 Minn. 433, § 463.
 v. Tucker, 4 Johns. 487, §§ 408, 409.
Dane County v. Dunning, 20 Wis. 210, § 93.
Daniel v. Gray, 53 Ark. 50, § 198.
Daniels v. People, 21 Ill. 443, § 306.
 v. R. R. Co. 35 Iowa, 129, § 414.
Darden v. Mathews, 22 Tex. 320, § 416.
Darling v. Dodge, 36 Me. 370, § 301.
Darrell v. Pritchard, 12 Jur. N. S. 16, § 90.
Dassler v. Wisley, 32 Mo. 498, § 312.
Davenport v. Commonwealth, 1 Leigh, 588, § 253.
 v. Cummings, 15 Iowa, 219, § 409.
Davenport, &c. Co. v. Davenport, 13 Iowa, 229, §§ 169, 194.
Davis v. Allen, 11 Pick. 466, § 170.
 v. Bangor, &c. R. R. Co. 60 Me. 203, § 69.
 v. Brigham, 29 Me. 471, § 214.
 v. Caldwell, 12 Cush. 512, § 299.
 v. Fish, 1 Green, 410, § 455.
 v. Hunter, 7 Ala. 135, § 176.
 v. Ins. Co. 4 R. I. 277, § 282.
 v. Kenaga, 51 Ill. 168, § 288.
 v. Lee, 26 Miss. 505, § 274.

- Davis v. Perley*, 30 Cal. 630, § 340.
v. People, 19 Ill. 74, §§ 118, 403.
v. People, 50 Ill. 200, § 431.
v. State, 33 Geo. 98, § 250.
v. State, 35 Ind. 496, § 403.
v. Strohn, 17 Iowa, 421, § 345.
Davidson v. Stanley, 3 Scott, 49, § 324.
Day v. Brawley, 1 Penn. St. 429, § 421.
Dayharsh v. Enos, 1 Seld. 531, § 130.
Dawson v. Horan, 51 Barb. 549, § 100.
v. People, 25 N. Y. 399, § 44.
Deacon v. Shreve, 2 Zab. 176, § 392.
Deakers v. Temple, 41 Penn. St. 242, § 269.
Dean v. State, 43 Geo. 218, § 427.
Dearmond v. Dearmond, 10 Ind. 191, §§ 174, 291.
Dedieu v. People, 22 N. Y. 178, § 430.
De Foncleur v. Shottenkirk, 3 Johns. 170, § 290.
De Ford v. Furniss, 43 Miss. 132, § 414.
Deford v. Reynolds, 36 Penn. St. 325, § 284.
De Forrest v. Storey, 8 Conn. 513, § 293.
Delafield v. Parish, 25 N. Y. 9, § 220.
Delamatyr v. R. R. Co. 24 Wis. 582, § 298.
Delancy v. Seymour, 5 Cow. 714, § 92.
Delaplane v. Crenshaw, 15 Gratt. 457, § 253.
Delaware Ins. Co. v. Winter, 38 Penn. St. 176, § 279.
Delvee v. Boardman, 20 Iowa, 448, § 361.
Demund v. Gowen, 5 N. J. L. 687, § 390.
Denton v. Lewis, 15 Iowa, 301, § 406.
De Rider v. McKnight, 13 Johns. 293, § 290.
Des Arts v. Leggett, 5 Duer, 156, § 310.
Des Moines v. Layman, 21 Iowa, 153, § 104.
Detroit, &c. R. R. Co. v. Van Stenberg, 17 Mich. 99, § 296.
Devaughn v. Heath, 37 Ala. 595, § 343.
Dewar v. Purday, 3 Ad. & El. 166, § 107.
Dewitt v. Miller, 9 Tex. 245, § 418.
D'Wolf v. Rauband, 1 Pet. 476, § 107.
Dexter v. Spear, 4 Mason, 115, § 265.
Dibble v. Morris, 26 Conn. 416, § 343.
Dick v. State, 30 Miss. 593, § 365.
v. State, 3 Ohio St. 89, § 431.
Dickens v. N. Y. Central R. R. Co. 1 Abb. App. Dec. 504, § 294.
Dickerson v. Burke, 25 Geo. 225, § 250.
v. Hays, 4 Blatchf. 107, § 419.
v. Johnson, 24 Ark. 251, § 314.
Dickson v. Evans, 6 T. R. 57, § 216.
Diehl v. Peters, 1 S. & R. 367, § 414.
Dillingham v. Skein, 1 Hemp. 181, § 202.
v. Snow, 5 Mass. 547, § 474.
Dilworth v. Commonwealth, 12 Gratt. 689, § 194.
Dimes Sav. Inst. v. Allentown Bank, 61 Penn. St. 391, § 344.
Ditmars v. Commonwealth, 47 Penn. St. 335, § 324.
Diveny v. Elmira, 51 N. Y. 506, § 169.
Dixon v. Richards, 2 How. (Miss.) 771, § 76.
v. State, 4 Greene, 381, § 201.
Doan v. Duncan, 17 Ill. 272, § 319.
v. State, 26 Ind. 495, § 336.
Dobbins v. Oswalt, 20 Ark. 619, § 254.
v. State, 14 Ohio St. 493, § 487.
Dobson v. Finley, 8 Jones L. 495, § 305.
Dodge v. Griswold, 12 N. H. 575, §§ 91, 92.
v. Rogers, 9 Minn. 223, §§ 304, 337, 339.
Doe v. Barnes, 4 T. R. 476, § 214.
v. Brayne, 5 C. B. 656, § 215.
v. Davies, 10 Q. B. 322, § 308.
v. Grymes, 1 Pet. 469, § 107.
v. Keeling, 11 Q. B. 89, § 309.
v. Kemp, 7 Bing. 336, § 309.
v. Lewis, 1 C. & Kir. 122, § 215.
v. Manning, 2 Burr. 937, § 266.
v. Scribner, 36 Me. 168, § 461.
v. Smith, 2 T. R. 436, § 287.
v. Tucker, M. & M. 536, § 215.
d. Ashburnham v. Michael, 16 Q. B. 320, § 73.
dem. Jenkins v. Davies, 10 Q. B. 323, § 308.
Doering v. State, 49 Ind. 56, § 265.
Doebbling v. Loos, 45 Mo. 159, § 292.
Doggett v. Jordan, 2 Fla. 541, §§ 274, 316.
Dollaway v. Turrell, 26 Wend. 399, § 385.
Dominick v. Eaker, 3 Barb. 17, § 421.
Donner v. Palmer, 23 Cal. 40, § 405.
Donoghoe v. People, 6 Park. Cr. 120, § 336.
Donston v. State, 6 Humph. 275, § 398.
Dorr v. Fenno, 12 Pick. 521, § 406.
Doster v. Brown, 25 Geo. 24, § 250.
Dougherty v. People, 5 Ill. 179, § 434.
Douglas v. McChesney, 2 Rand. 109, § 92.
Douglass v. Tousey, 2 Wend. 352, §§ 449, 462.
Dover v. Maestaer, 5 Esp. 96, § 221.
Dowdale's case, Cro. Jac. 55, § 445.
Dowling v. Finigan, 1 C. & P. 587, § 221.
v. State, 5 Smed. & M. 664, § 106.
Downer v. Rowell, 24 Vt. 343, § 229.
Downing v. Bain, 24 Geo. 372, § 301.
Drainage case, 6 Vroom, 497, § 104.

Drake v. Branler, 8 Tex. 351, § 202.
 v. Ins. Co. 3 Grant (Pa.), 325, § 282.
 v. Palmer, 4 Cal. 11, § 371.
 Drakeley v. Gregg, 8 Wall. 242, § 355.
 Drayton v. Logan, Harp. Eq. 57, § 91.
 Drew v. R. R. Co. 26 N. Y. 49, § 297.
 Driggs v. Burton, 44 Vt. 124, § 271.
 Driskell v. State, 7 Ind. 338, § 178.
 Drury v. White, 10 Mo. 354, § 314.
 Dryden v. Britton, 19 Wis. 22, § 354.
 Duane v. Simmons, 4 Yeates, 441, §§ 432, 445.
 Duchess of Kingston's case, 20 How. St. Tr. 619, § 229.
 Duffy v. People, 6 Hill, 75, §§ 43, 95.
 v. People, 26 N. Y. 588, § 378.
 Duke of Richmond v. Wise, 1 Vent. 125, § 398.
 Dula v. Young, 70 N. C. 450, § 352.
 Dull v. People, 4 Denio, 91, § 165.
 Dulles v. DeForest, 19 Conn. 201, § 377.
 Duncan v. Topham, 8 C. B. 225, § 290.
 v. Wetty 20 Ind. 44, § 308.
 Dunham v. Baxter, 4 Mass. 79, § 470.
 Dunlap v. Hayden, 29 Ind. 303, 415.
 v. Hearne, 8 Geo. 478, § 316.
 Dunlop v. Higgins, 1 H. L. Cas. 381, § 290.
 Dunn v. People, 29 N. Y. 523, § 361.
 Durant v. Banta, 3 Dutch. 637, § 293.
 Durell v. Mosher, 8 Johns. 445, § 184.
 Durham v. Holeman, 30 Geo. 619, § 367.
 v. State, 1 Blackf. 33, § 426.
 Durkee v. R. R. Co. 29 Vt. 127, § 290.
 Dyer v. Hatch, 1 Ark. 339, § 414.
 Dygert v. Remerschnider, 32 N. Y. 637, § 268.

E.

Eagan v. Fitchburgh, &c. R. R. Co. 101 Mass. 315, § 295.
 Earle v. Earle 20 N. J. Law, 347, § 291.
 Early v. Garland, 13 Gratt. 1, § 323.
 Eastham v. Curd, 15 B. Mon. 105, § 325.
 Eastwood v. People, 3 Park. Cr. 25, § 410.
 Eaton v. Jacobs, 52 Me. 445, § 289.
 Eberhart v. State, 47 Geo. 598, § 194.
 Eberle v. Board, &c. St. Louis Public Schools, 11 Mo. 247, § 169.
 Edelman v. Yeakel, 27 Penn. St. 26, § 301.
 Edgar v. State, 43 Ala. 53, § 349.
 Edgell v. Hart, 13 Barb. 380, § 267.
 v. Hart, 9 N. Y. 313, § 267.
 Edlin v. Thompson, 2 Harr. & J. 31, § 460.
 Educational Ass. v. Hitchcock, 4 Kan. 36, § 415.
 Edwards v. Elliott, 21 Wall. 557, § 97.

Edwards v. Goldsmith, 16 Penn. St. 47, § 302.
 v. Matthews, 11 Jur. 398, § 222.
 v. McCaddon, 20 Iowa, 520 § 414.
 v. State, 49 Ala. 334, § 202.
 v. State, 47 Miss. 581, § 337.
 Egan v. Larkin, 1 Arm., M. & O. 408, § 309.
 Eggleston v. Smiley, 17 Johns. 133, § 174.
 Eiseman v. Swan, 6 Bosw. 668, §§ 418, 437.
 Elledge v. Todd, 1 Humph. 43, § 406.
 Ellis v. Buzzell, 60 Me. 209, § 335.
 v. Lindley, 38 Iowa, 461, § 335.
 v. Matthews, 19 Tex. 390, § 320.
 v. Ohio Life, &c. Co. 4 Ohio St. 628, § 107.
 v. People, 21 How. 356, § 265.
 Ellithorpe v. Buck, 17 Ohio St. 72, § 112.
 Elwell v. Chamberlain, 31 N. Y. 611, § 214.
 Elwood v. Telegraph Co. 45 N. Y. 549, § 363.
 Emerick v. Harris, 1 Binn. 416, §§ 99, 100.
 v. Sloan, 18 Iowa, 139, § 142.
 Emerson v. Blakely, 2 Abb. App. Dec. 22, § 464.
 v. County, 40 Cal. 543, § 474.
 v. Lakin, 10 Shep. 384, § 419.
 v. Miller, 21 Pa. St. 278, § 274.
 v. Santa Clara, 40 Cal. 543, § 337.
 Eno v. Hunt, 8 Iowa, 436, § 414.
 Epes' case, 5 Gratt. 676, § 138.
 Epps v. State, 19 Geo. 102, § 193.
 v. State, 19 Geo. 752, § 389.
 Ermul v. Kullock, 3 Kan. 499, § 471.
 Ernst v. Hudson, &c. R. R. Co. 39 N. Y. 61, § 294.
 Erving v. Ingram, 4 Zab. 520, § 301.
 Erwin v. Bulla, 29 Ind. 95, § 390.
 v. Clark, 16 Mich. 10, § 436.
 v. Voorhees, 26 Barb. 145, § 266.
 Essex v. McPherson, 64 Ill. 349, § 170.
 Estep v. Waterous, 45 Ind. 140, § 115.
 Estes v. Boothe, 20 Ark. 583, § 300.
 Estwick v. Cailland, 5 T. R. 420, § 266.
 Evans v. State, 44 Miss. 762, § 314.
 Everett v. Stowell, 14 Allen, 32, § 352.
 Ewing v. Glidwell, 3 How. 332, § 107.
 v. Gray, 12 Ind. 70, § 268.
 v. Peck, 26 Ala. 413, § 292.
 v. Sandford, 19 Ala. 605, § 271.
 Executrix v. Executors, 52 Penn. St. 528, § 288.
 Express Co. v. Kountze, 8 Wall. 342, § 311.
 v. Parsons, 44 Ill. 312, § 313.

F.

- Fackler v. Chapman*, 20 Mo. 249, § 368.
Fairbanks v. Woodhouse, 6 Cal. 433, § 300.
Faith v. McIntyre, 7 C. & P. 44, § 213.
Falmouth v. Roberts, 9 M. & W. 469, § 74.
Famulener v. Anderson, 15 Ohio N. S. 473, § 144.
Farmers' Bank v. Smith, 19 Johns. 115, § 196.
 v. Vail, 21 N. Y. 487, § 284.
Farnan v. Childs, 66 Ill. 544, § 316.
Farquhar v. Dallas, 20 Tex. 200, § 325.
Farrell v. Brennan, 32 Mo. 328, § 220.
Farwell v. Warren, 51 Ill. 467, § 343.
Faulk v. Faulk, 23 Tex. 653, § 89.
Fay v. O'Neil, 36 N. Y. 11, § 340.
Featherston v. Featherston, 11 Ired. 317, § 290.
Feeler v. Whipple, 8 Johns. 369, § 472.
Feler v. N. Y. Cent. & C. R. R. Co. 49 N. Y. 47, § 295.
Fellows' case, 5 Greenl. 333, §§ 136, 465.
Fenalty v. State, 7 Eng. 630, § 44.
Ferguson v. Clifford, 37 N. H. 86, § 290.
 v. State, 49 Ind. 33, § 209.
Ferriday v. Selser, 4 How. (Miss.) 506, § 170.
Ferris v. Coover, 10 Cal. 622, § 305.
 v. People, 35 N. Y. 155, §§ 135, 154.
Fielder v. Darrin, 50 N. Y. 437, § 292.
Fife v. Commonwealth, 29 Penn. St. 429, § 433.
Filer v. N. Y. Cent. R. R. Co. 49 N. Y. 47, § 297.
Filkins v. Baker, 6 Lans. 516, § 229.
Finch v. State, 6 Blackf. 533, § 60.
Findley v. People, 1 Mann. 234, §§ 48, 61.
Fine v. St. Louis, & c. 30 Mo. 166, § 169.
 v. St. Louis, 39 Mo. 59, § 320.
Fire Department v. Harrison, 2 Hilt. 455, § 98.
Firemen's Ins. Co. v. Walden, 12 Johns. 513, § 280.
First Nat. Bank v. Currie, 44 Mo. 91, § 311.
 v. Haight, 55 Ill. 191, § 362.
 v. Hurford, 29 Iowa, 579, § 315.
Fish v. Davis, 62 Barb. 122, § 355.
Fisher v. Farley, 23 Penn. St. 501, § 415.
 v. People, 23 Ill. 283, §§ 348, 380.
 v. Porch, 2 Stockt. 243, §§ 91, 92.
Fisher v. Stevens, 16 Ill. 397, § 276.
Fitch v. Ins. Co. 59 N. Y. 557, § 281.
Fitzgerald v. People, 49 Barb. 122, 424.
 v. State, 4 Wis. 395, § 46.
Fizell v. State, 25 Wis. 364, § 54.
Flagg v. City of Worcester, 8 Cush. 69, § 169.
Flanders v. Davis, 19 N. H. 139, § 404.
Fleming v. Mulligan, 2 McCord, 173, § 293.
 v. State, 11 Ind. 234, §§ 168, 169.
Fletcher v. State, 6 Humph. 249, § 489.
 v. State, 49 Ind. 124, § 252.
Flinn v. Barlow, 16 Ill. 39, § 457.
Flint River S. Co. v. Foster, 5 Geo. 206, §§ 88, 101, 112.
Flynn v. Hathaway, 65 Ill. 462, § 306.
Foley v. Alkire, 52 Mo. 317, § 446.
Folsom v. Brawn, 5 Fo-t. 114, § 335.
 v. Plumer, 43 N. H. 469, § 302.
Foot v. Silsby, 1 Blatchf. 445, § 139.
Foot v. Nicholls, 28 Ill. 486, § 343.
Forbes v. Howard, 4 R. I. 364, § 406.
Ford v. Targart, 4 Tex. 492, § 415.
Ford v. Williams, 24 N. Y. 359, § 267.
Forkner v. Stuart, 6 Gratt. 197, § 268.
Forney v. Ferrell, 4 W. Va. 729, § 244.
Forshee v. Abrams, 2 Clarke, 571, § 385.
Forsythe v. State, 6 Ohio, 19, § 135.
Foster v. Brooks, 6 Geo. 287, § 389.
 v. People, 50 N. Y. 598, § 337.
Fountain v. West, 23 Iowa, 9, § 335.
Foust v. Commonwealth, 33 Penn. St. 338, § 154.
 v. Yielding, 28 Ala. 658, § 322.
Fouts v. State, 4 Greene, 500, § 331.
 v. State, 7 Ohio St. 471, § 183.
Fowler v. Coster, 1 Mood. & M. 243, § 212.
 v. Scully, 72 Penn. St. 456, § 303.
 v. Waldrup, 10 Geo. 350, § 473.
Fox v. Ford, 5 Rich. Eq. 349, § 92.
 v. Hazleton, 10 Pick. 275, § 198.
 v. Smith, 3 Cow. 23, § 465.
Franklin, & c. Ins. Co. v. Coates, 14 Md. 285, § 281.
Franklin v. State, 12 Md. 236, §§ 253, 381.
Franks v. State, 1 Iowa, 541, § 368.
Frantz v. Lenhart, 56 Penn. St. 365, § 367.
Freel v. State, 21 Ark. 213, § 133.
Freeman v. Arkel, 1 Car. & P. 135, § 49.
 v. People, 4 Denio, 31, §§ 167, 184, 190.
Freemantle v. London, & c. R. R. Co. 10 C. B. N. S. 89, § 295.
Freestone v. Butcher, 9 C. & P. 647, § 299.

- Freligh v. Ames*, 31 Mo. 253, § 254.
French v. Hanchett, 12 Pick. 15, § 444.
 v. Millard, 2 Ohio St. 44, § 363.
Friar v. State, 3 How. 422, § 58.
Friend v. Hamill, 34 Md. 298, § 123.
Friery v. People, 54 Barb. 319, §§ 115, 154, 165.
Frost v. Martin, 29 N. H. 306, § 292.
Fry v. Bennett, 28 N. Y. 324, § 222.
 v. Hill, 7 Taunt. 397, § 286.
Frye v. Moore, 53 Me. 583, § 418.
Fryer v. Roe, 22 Eng. L. & Eq. 440, § 438.
Fugate v. Carter, 6 Mo. 267, § 325.
Fugitt v. Nixon, 44 Mo. 295, § 325.
Fulkerson v. Bollinger, 9 Mo. 838, § 473.
Fullager v. Clark, 18 Ves. 481, § 94.
Fuller v. Bradley, 25 Pa. St. 120, § 302.
 v. Coates, 18 Ohio St. 343, § 337.
 v. State, 1 Blackf. 63, §§ 138, 142.
 v. Talbot, 23 Ill. 357, § 251.
Funk v. Ely, 45 Penn. St. 444, § 174.
 v. Staats, 24 Ill. 632, § 267.
Funkhouser v. Pogue, 8 Eng. 295, § 194.
- G.
- Gaff v. Hutchinson*, 38 Ind. 341, § 415.
Gage v. Parker, 25 Barb. 145, § 266.
Gagg v. Vetter, 41 Ind. 228, § 295.
Gahagan v. R. R. Co. 1 Allen. 87, § 297.
Gaither v. Farabee, Winst. L. 310, § 355.
Galbraith v. Atkinson, 15 Tex. 21, § 463.
Gale v. Ward, 14 Mass. 352, § 267.
Gambert v. Hart, 44 Cal. 542, § 296.
Gamwell v. Ins. Co. 12 Cush. 167, § 281.
Gandolfo v. State, 11 Ohio St. 114, § 405.
Gardiner v. People, 6 Park. Cr. 155, § 135.
Gardner v. Adams, 12 Wend. 297, § 267.
 v. Boothe, 31 Ala. 189, § 268.
 v. Gardner, 22 Wend. 526, § 91.
 v. People, 3 Scam. 83, §§ 55, 58.
 v. Stell, 3 Tex. 561, § 325.
 v. Stell, 34 Tex. 561, § 300.
 v. Turner, 9 Johns. 260, §§ 128, 130, 153.
Garland v. Davis, 4 How. 131, § 417.
Garnett v. Ferrand, 6 B. & C. 611, § 66.
Garr v. Selden, 4 N. Y. 91, § 254.
Garrison v. Portland, 2 Oregon, 123, § 169.
Garrison v. Wilcoxson, 11 Geo. 154, § 248.
Garthwaite v. Tatum, 21 Ark. 36, § 189.
Garwood v. Eldridge, 1 Green Ch. 290, § 93.
Gaston v. Babcock, 6 Wis. 503, § 101.
 v. Board of Commrs. 3 Ind. 497, § 64.
Gates v. Ins. Co. 2 N. Y. 43, § 280.
 v. People, 14 Ill. 433, §§ 55, 179.
Gatliff v. Bourne, 2 M. & Rob. 100, § 73.
Gatling v. Newell, 9 Ind. 572, § 287.
Gavett v. R. R. Co. 16 Gray, 501, § 297.
Gay v. Bidwell, 7 Mich. 519, § 267.
Geary v. People, 22 Mich. 220, § 245.
Gehr v. Hagerman, 28 Ill. 438, § 325.
Genner v. Walker, 3 Am. L. Rep. 590, § 299.
George v. State, 39 Miss. 570, § 339.
 v. Whitmore, 26 Beav. 557, § 94.
Gerald v. Boston, 108 Mass. 580, § 295.
Gest v. Kenner, 7 Ohio St. 75, § 112.
Gholston v. Gholston, 31 Geo. 625, § 77.
Gibbons v. U. S. 2 Ct. of Cl. 421, § 292.
Gibbs v. State, 3 Heisk. 72, § 170.
Gibson v. Ins. Co. 37 N. Y. 580, § 283.
 v. Lewis, 27 Mo. 532, § 416.
Gilbert v. Sage, 5 Ians. 287, § 361.
Gillespie v. State, 8 Yerg. 507, § 198.
Gillet v. Helps, 12 Wis. 392, § 346.
Gilmanton v. Ham, 38 N. H. 108, § 401.
Girard v. Gettig, 2 Binn. 234, § 107.
Girdner v. Taylor, 6 Heisk. 244, § 316.
Girts v. Commonwealth, 22 Penn. St. 351, § 425.
Glassell v. Mason, 32 Ala. 719, § 310.
Glassey v. Hestonville, &c. R. R. Co. 57 Penn. St. 172, § 297.
Gleason v. Day, 9 Wis. 498, § 268.
Glover v. Duhle, 19 Mo. 360, § 326.
 v. Woolsey, Dudley, 85, § 194.
Godin v. Bank, 6 Duer, 76, § 354.
Golding v. Merchant, 43 Ala. 705, §§ 314, 338.
Goldsborough v. Cradie, 28 Md. 477, § 337.
Goodall v. Thurman, 1 Head, 209, § 343.
Goodman v. Simonds, 20 How. 343, § 284.
Goodtitle v. Braham, 4 T. R. 498, § 214.
Goodwin v. Appleton, 2 Me. 453, § 457.
 v. Blachley, 4 Ind. 438, § 185.
Gordon v. Parmalee, 15 Gray, 413, § 335.
Gover v. Turner, 39 Ill. 164, § 415.
 v. Turner, 28 Md. 600, § 432.
Governor v. Shelby, 2 Blackf. 26, § 321.
Grable v. State, 2 Greene, 559, § 139.

Grace, ex parte, 12 Iowa, 208, § 103.
 Graham v. Commonwealth, 16 B. Mon. 587, § 211.
 v. Gautier, 21 Tex. 111, § 214.
 v. Van Diemen's Land Co. 30 Eng. L. & Eq. 578, § 287.
 Grand Lodge v. Knox, 27 Mo. 315, § 301.
 Grand T. R. R. Co. v. Nichol, 18 Mich. 170, § 352.
 Grant v. Moore, 29 Cal. 644, § 271.
 Gratz v. Benner, 13 Serg. & R. 110, § 170.
 Gray v. Bean, 27 Iowa, 221, § 314.
 v. Burk, 19 Tex. 228, §§ 252, 318.
 v. People, 26 Ill. 344, § 183.
 Great West. Co. v. Loomis, 32 N. Y. 127, § 241a.
 v. Loomis, 32 N. Y. 132, § 247.
 Green v. Bliss, 12 How. Pr. 428, §§ 410, 462.
 v. Craig, 47 Mo. 90, § 343.
 Greene v. Bateman, 2 Wood. & M. 359, § 290.
 v. Briggs, 1 Curtis C. C. 311, §§ 97, 102.
 v. R. R. Co. 38 Iowa, 100, § 368.
 v. State, 28 Miss. 687, § 270.
 Greenleaf v. Ill. Cent. R. R. Co. 29 Iowa, 14, § 295.
 Greenough v. Gaskell, 1 Myl. & K. 103, § 246.
 Greeson v. State, 5 How. (Miss.) 33, § 59.
 Gregory v. Cheatham, 36 Mo. 155, § 340.
 v. Frothingham, 1 Nev. 253, § 440.
 v. Inhabitants, &c. 14 Gray, 242, § 298.
 Grice v. Ferguson, 1 Stew. 36, § 446.
 Griffin v. State, 15 Geo. 477, §§ 185, 192.
 Griffith v. Ely, 12 Mo. 520, § 269.
 v. Eshelman, 4 Watts, 51, § 245.
 Griffiths v. Rigby, 37 Eng. L. & Eq. 519, § 301.
 Grimes v. Martin, 10 Iowa, 347, § 339.
 Grinnell v. Phillips, 1 Mass. 530, § 389.
 v. Stewart, 32 Barb. 544, § 270.
 Griswold v. Sheldon, 4 N. Y. 580, § 267.
 Groft v. Weakland, 34 Penn. St. 304, § 289.
 Gropp v. People, 67 Ill. 154, §§ 129, 153.
 Gross v. State, 2 Carter, 329, § 178.
 Grout v. Nicholls, 53 Me. 383, § 312.
 Grover v. Dill, 3 Iowa, 337, § 337.
 Groves v. Bailey, 24 Miss. 588, § 446.
 Grurgeon v. Gerrard, 4 Y. & C. 119, § 92.
 Guile v. Brown, 38 Conn. 237, § 100.
 Gulick v. Grover, 4 Vroom, 463, § 274.
 Gunther v. People, 24 N. Y. 100, § 423.

Guptill v. Damon, 42 Me. 271, § 301.
 Gurney v. Smithson, 7 Bosw. 396, § 315.
 Guykowski v. People, 1 Scam. 476, §§ 116, 171.

H.

Hackford v. N. Y. Cent. & C. R. R. Co. 53 N. Y. 654, § 295.
 Hadley v. Importing Co. 13 Ohio St. 505, § 269.
 Hague v. State, 34 Miss. 616, § 331.
 Haight v. Holley, 3 Wend. 258, § 130.
 Hailes v. Marks, 7 H. & N. 55, § 271.
 Haines v. Kent, 11 Ind. 126, § 222.
 v. Levin, 51 Penn. St. 412, § 101.
 Hair v. Little, 28 Ala. 236, §§ 343, 421.
 Hall v. City of Lowell, 10 Cush. 260, § 298.
 v. Gale, 20 Wis. 292, § 371.
 v. Manchester, 40 N. H. 410, § 298.
 v. Page, 4 Geo. 128, § 471.
 v. Renfro, 3 Met. (Ky.) 51, § 364.
 v. Robinson, 25 Iowa, 91, §§ 393, 408.
 v. Rupley, 10 Penn. St. 231, § 405.
 v. State, 4 Greene, 73, § 56.
 v. State, 8 Ind. 439, § 348, 433.
 v. Wheeler, 13 Ind. 372, § 291.
 v. York, 16 Tex. 18, § 413.
 Hallock v. Commercial Co. 2 Dutch. 268, § 290.
 Hamet v. Dundas, 4 Penn. St. 178, § 268.
 Hamilton v. Dudley, 2 Peters, 524, § 69.
 v. Prase, 38 Conn. 115, § 390.
 v. Rice, 15 Tex. 382, § 418.
 Hammett v. Yea, 1 Bos. & P. 144, § 293.
 Hampton v. Dean, 4 Tex. 455, § 315.
 v. Waterston, 14 La. An. 239, § 414.
 Hancock v. Horan, 15 Tex. 507, § 268.
 Handy v. Providence, 1 R. I. 400, § 409.
 Hanna v. People, 19 Mich. 316, § 427.
 Hanson v. Buckner, 4 Dana, 251, § 268.
 Hapgood v. Doherty, 8 Gray, 373, § 101.
 Harbach v. State, 43 Tex. 243, § 165.
 Hardey v. Turney, 9 Ohio St. 400, § 350.
 Hardin v. State, 26 Tex. 113, § 448.
 Hardy v. De Leon, 5 Tex. 211, § 418.
 v. Simpson, 13 Ired. 132, § 266.
 v. Sproule, 32 Me. 310, § 174.
 v. State, 7 Mo. 607, § 380.
 v. State, 19 Ohio St. 579, § 452.
 Harkrader v. Moore, 44 Cal. 144, § 270.
 Harman v. Shotwell, 49 Mo. 423, § 337.
 Harper v. Ins. Co. 19 Mo. 506, § 283.
 v. State, 43 Tex. 381, § 455.
 Harriman v. State, 2 Greene, 270, §§ 134, 201, 202.
 Harris v. Ingledew, 3 P. Wms. 91, § 220.
 v. Vanderveer, 21 N. J. Eq. 561, § 220.

- Harris v. Wilson*, 1 Wend. 511, § 326.
v. Wilson, 7 Wend. 57, §§ 245, 308.
Harrisburg Bank v. Foster, 8 Watts, 304, § 177.
Harrison v. Hance, 37 Mo. 185, § 404.
v. Price, 22 Ind. 165, § 389.
Hart v. Miller, 3 A. K. Marsh. 337, § 321.
Hartfield v. Roper, 21 Wend. 615, § 297.
Hartford, &c. Ins Co. v. Harmer, 2 Ohio St. 452, § 281.
Hartness v. Thompson, 5 Johns. 160, § 421.
Hartzell v. Commonwealth, 4 Wright, 463, §§ 106, 162, 165.
Harvey v. Ellithorpe, 26 Ill. 418, § 214.
v. Jones, 3 Humph. 157, § 407.
v. Mitchell, 2 M. & Rob. 366, § 220.
v. State, 40 Ind. 516, § 251.
Hasbrouck v. Milwaukee, 21 Wis. 238, § 349.
Haskins v. Haskins, 9 Gray. 390, § 346.
v. People, 16 N. Y. 344, § 365.
Hatch v. Bates, 54 Me. 136, § 291.
v. Garza, 22 Tex. 176, § 316.
v. Hatch, 9 Mass. 307, § 291.
v. Peugnet, 64 Barb. 189, § 91.
Hathaway v. Helmer, 25 Barb. 29, § 177.
Hattenback v. Haskins, 12 Iowa, 109, § 416.
Hauser v. Roth, 37 Ind. 89, § 112.
Hawkins v. Carbines, 3 Hurl. & N. 910, § 306.
v. Crofton, 2 Burr. 698, § 464.
v. House, 65 N. C. 614, § 417.
Hawkinson v. Lombard, 25 Ill. 574, § 274.
Hay v. Douglas, 8 Abb. Pr. N. S. 217, § 247.
v. Osterout, 3 Ohio. 384, § 464.
Haycock v. Greup, 57 Penn. St. 438, § 414.
Hayden v. Manfr. Co. 29 Conn. 558, § 284.
v. Nott, 9 Conn. 370, § 377.
Hayes v. Greene, 4 Binn. 84, § 107.
Hayne v. State, 34 Miss. 616, § 270.
Haynes v. Crutchfield, 7 Ala. 189, § 194.
Hays v. Hogan, 4 Tex. 26, § 340.
v. Hynds, 28 Ind. 531, § 314.
Haywood v. Harmon, 17 Ill. 477, § 288.
Hayworth v. State, 14 Ind. 290, § 425.
Hazen v. Commonwealth, 11 Harris, 355, § 423.
Heacock v. State, 42 Ind. 393, § 59.
Head v. Hughes, 1 Marsh. 372, § 101.
v. State, 44 Miss. 731, §§ 44, 115, 270.
Heard v. Pierce, 8 Cush. 338, § 55.
Heartt v. Rhodes, 66 Ill. 351, § 317.
Heath v. Conway, 1 Bibb, 398, § 407.
Hecker v. Hopkins, 16 Abb. Pr. 30 § 212.
v. Sterling, 36 Penn. St. 423, § 305.
Hector v. State, 2 Miss. 166, §§ 483, 489.
Hegeman v. R. R. Co. 16 Barb. 353, § 298.
Heller v. Crawford, 37 Ind. 279, § 303.
Helm v. Cantrell, 59 Ill. 525, § 228.
Henderson's Distilled Spirits, 14 Wall 44, § 110.
Hendrickson v. Kingsbury, 21 Iowa, 379, § 410.
Henry v. Rich, 64 N. C. 379, § 355.
Henslie v. State, 3 Heisk. 202, § 464.
Heritage v. Hall, 33 Barb. 347, § 471.
Herndon v. Bryant, 10 George, 335, § 314.
Hewitt v. Begole, 22 Mich. 31, § 315.
Heyne v. Blair, 3 Thomp. & C. 264, § 270.
Heyneman v. Blake, 19 Cal. 579, § 104.
Hick v. Keats, 4 B. & C. 69, § 440.
Hickey v. Ryan, 15 Mo. 62, § 325.
Hicks v. Maness, 19 Ark. 701, § 471.
Higgins v. Carleton, 28 Md. 115, § 337.
Higgs v. Wilson, 3 Met. (Ky.) 337, § 366.
Highley v. Newell, 28 Iowa, 516, § 460.
Highway Comrs. v. Highway Comrs. 60 Ill. 58, § 306.
Hildeburn v. Curran, 65 Penn. St. 59, § 245.
Hildreth v. Schillinger, 2 Stock. Ch. 196, §§ 90, 93.
Hill v. Canfield, 56 Penn. St. 454, §§ 313, 355.
v. Covell, 1 Comst. 522, § 438.
v. Mason, 7 Jones L. 551, § 305.
v. People, 16 Mich. 351, §§ 113, 179.
v. State, 41 Geo. 484, § 328.
v. State, 2 Yerg. 246, § 164.
Hilton v. Shepherd, 6 East, 14, § 286.
Hindehopper v. Cotton, 3 Watts, 56, § 455.
Hines v. State, 8 Humph. 597, § 139.
Hinton v. McNeil, 5 Ham. 509, § 474.
Hitchman v. Jones, 9 Wall. 197, § 355.
Hitt v. Rush, 22 Ala. 563, § 367.
Hoadley v. McLaine, 10 Bing. 482, § 290.
Hoar v. Wood, 3 Met. 193, § 255.
Hoare v. Hindley, 49 Cal. 275, § 410.
Hobart v. Hilliard, 11 Pick. 144, § 284.
Hobson v. Humphries, 2 Mill, Const. 371, § 457.
Hodges v. Cooper, 43 N. Y. 216, § 338.
v. Holden, 3 Campb. 366, § 214.
Hodgson v. Millward, 3 Grant, 406, § 343.

- Hodgson v. Scarlett, 1 B. & A. 232, § 255.
 Hoffman v. Danner, 14 Penn. St. 25, § 305.
 Hoghtaling v. Osborn, 15 Johns. 118, § 455.
 Hogshead v. State, 6 Humph. 59, § 387.
 Hoitt v. Burleigh, 18 N. H. 389, §§ 91, 94.
 Holbrook v. Baker, 5 Me. 309, § 267.
 v. Utica, &c. R. R. Co. 12 N. Y. 236, § 294.
 Holcomb v. Holcomb, 28 Conn. 117, § 308.
 Holden v. Bloxom, 35 Miss. 381, § 473.
 Holliday v. Atkinson, 5 B. & C. 501, § 326.
 Hollingsworth v. Duane, 4 Dall. 353, § 116.
 Hollister v. Johnson, 4 Wend. 639, § 326.
 Holman v. Crane, 6 Ala. 570, § 300.
 v. Riddle, 8 Ohio St. 384, § 409.
 Holmes v. Watson, 29 Penn. St. 457, § 342.
 v. Wood, 6 Mass. 1, § 446.
 Holt v. Lamb, 17 Ohio St. 374, § 468.
 v. People, 13 Mich. 234, §§ 167, 193.
 Hone v. Treasurer, 8 Vroom, § 87.
 Hooe v. Marquess, 4 Call, 416, §§ 91, 92.
 Hooker v. Johnson, 6 Fla. 630, § 313.
 v. State, 4 Ohio, 348, § 165.
 Hooper v. Edwards, 18 Ala. 280, § 303.
 Hoover v. Tibbitts, 13 Wis. 81, § 274.
 Hoot v. Spade, 20 Ind. 326, § 201.
 Hopkins v. Westcott, 6 Blatchf. 64, § 285.
 Hopkinson v. People, 18 Ill. 264, § 315.
 Hopps v. People, 31 Ill. 385, § 211.
 Horey v. Pitcher, 13 Mo. 191, § 274.
 Horne v. Pickett, 22 Tex. 201, § 300.
 Horton v. Moot, 60 Barb. 27, § 293.
 Hotcher v. State, 18 Geo. 460, § 250.
 Hotz v. Hotz, 2 Ashm. 245, § 198.
 Hough v. Ins. Co. 29 Conn. 10, § 277.
 Hovey v. Thompson, 37 Ill. 538, § 342.
 Howard v. City, &c. Co. 4 Denio, 502, § 245.
 v. Durand, 36 Geo. 346, § 103.
 Howel v. Commonwealth, 5 Gratt. 664, § 381.
 Howell v. Commonwealth, 5 Gratt. 664, § 253.
 Howland v. Gifford, 1 Pick. 43, § 144.
 Hoxie v. Green, 37 How. Pr. 97, § 214.
 Huddleston v. Machine Shop, 106 Mass. 282, § 357.
 Hudgins v. State, 2 Kelly, 173, §§ 106, 183.
 Hudson v. State, 34 Ala. 253, § 423.
 v. State, 1 Blackf. 317, §§ 115, 196.
 v. State, 38 Tex. 622, § 410.
 Hugg v. Kille, 2 Halst. 435, § 134.
 Hughes v. Corey, 20 Iowa, 399, § 267.
 v. Hughes, 4 Monr. 43, § 102.
 v. Monty, 24 Iowa, 499, § 316.
 Hull v. Carnley, 2 Duer, 99, § 267.
 Hunnewell v. Hobart, 42 Me. 565, § 315.
 Hunt v. Bennett, 19 N. Y. 173, § 385.
 v. Burrell, 5 Johns. 137, § 474.
 v. Poole, 1 Abb. (U. S.) 556, § 474.
 v. State, 49 Geo. 255, § 254.
 v. State, 25 Miss. 378, 424.
 Hunter v. Commonwealth, 2 S. & R. 298, § 445.
 Huntzinger v. Harper, 44 Penn. St. 206, § 266.
 Hurlburt v. Wheeler, 40 N. H. 73, § 291.
 Hurly v. State, 6 Ohio, 399, § 134.
 Hynds v. Hays, 25 Ind. 31, § 351.
 v. Ins. Co. 11 N. Y. 554, § 283.
 Hypfner v. Walsh, 3 Iowa, 509, § 306.

I.

- Ihl v. 42d R. R. Co. 47 N. Y. 317, § 297.
 Illinois, &c. R. R. Co. v. Able, 59 Ill. 131, § 407.
 v. Whitemore, 43 Ill. 420, § 287.
 Ill. Cent. R. R. Co. v. Welch, 52 Ill. 183, § 371.
 Indiana R. R. Co. v. Cavett, 12 Ind. 316, § 292.
 Indianapolis, &c. R. R. Co. v. Rutherford, 29 Ind. 82, § 294.
 Indianapolis R. R. Co. v. Taffe, 11 Ind. 458, § 418.
 Ingersoll v. Truebody, 40 Cal. 603, § 449.
 v. Wilson, 2 W. Va. 59, § 146.
 Inhabs. Shirley v. Lunenburg, 11 Mass. 379, § 98.
 Inkster v. Bank, 30 Mich. 143, § 300.
 Inskeep v. Lecony, Cox, 39, § 140.
 Insurance Co. v. Baring, 20 Wall. 159, § 354.
 v. Seitz, 4 Watts & S. 273, § 419.
 v. Weides, 14 Wall. 378, § 281.
 v. Wilkinson, 13 Wall. 222, § 277.
 v. Wright, 22 Ill. 462, § 414.
 Iron Co. v. Tomb, 48 Pa. St. 388, § 289.
 Irvine v. Lumbermen's Bank, 2 Watts & S. 190, § 185.
 Irving v. Taggart, 1 S. & R. 360, § 107.
 Isbell v. State, 31 Tex. 138, § 431.
 Isham v. State, 1 Sneed, 111, § 423.
 Israel v. Brooks, 23 Ill. 575, § 271.

J.

- Jackson v. Commonwealth*, 23 Gratt. 919, § 187.
v. Dickenson, 15 Johns. 309, § 408.
v. Jackson, 32 Geo. 325, § 390.
v. Jackson, 40 Geo. 150, §§ 414, 416.
v. Packard, 6 Wend. 415, § 324.
v. Pittsford, 8 Blackf. 194, §§ 165, 213.
v. R. R. Co. 23 Cal. 268, § 444.
v. State, 6 Blackf. 461, § 113.
v. Van Dusen, 5 Johns. 144, § 220.
v. Williamson, 2 T. R. 281, § 408.
Jacobs v. Tartleton, 11 Q. B. 421, § 213.
James v. Salter, 1 M. & Rob. 501, § 213.
v. Wilson, 7 Tex. 230, § 416.
Jane v. Commonwealth, 2 Met. (Ky.) 30, § 334.
Jaques v. Commonwealth, 10 Gratt. 690, § 174.
Jarboe v. Scherb, 34 Ind. 350, § 212.
Jarvis v. Hathaway, 3 Johns. 180, § 472.
Jeffersonville R. R. Co. v. Swift, 26 Ind. 459, § 314.
Jeffries v. Commonwealth, 12 Allen, 145, § 56.
v. Randall, 14 Mass. 205, § 170.
Jenkins v. Ore Dressing Co. 65 N. C. 563, § 252.
v. Parkhill, 25 Ind. 473, § 421.
v. State, 30 Miss. 408, § 59.
Jennings v. Asten, 5 Duer, 695, § 69.
v. Gage, 13 Ill. 611, § 268.
v. Maddox, 8 B. Mon. 430, § 343.
v. Paine, 4 Wis. 358, § 255.
Jesse v. State, 20 Geo. 156, §§ 118, 139.
Jetton v. State, Meigs, 192, § 55.
Jewell v. Commonwealth, 10 Harris, 94, § 160.
v. Commonwealth, 22 Penn. St. 94, § 139.
Johnson v. Barclay, 1 Harr. (N. J.) 1, §§ 95, 100.
v. Cole, 1 Penn. 266, § 132.
v. Davenport, 3 J. J. Marsh. 390, § 462.
v. Howe, 2 Gilm. 342, §§ 452, 462.
v. Johnson, 71 N. C. 402, § 323.
v. Perry, 2 Humph. 569, § 407.
v. R. R. Co. 11 Minn. 296, § 471.
v. Ray, 72 N. C. 273, § 305.
Johnson v. State, 33 Miss. 363, § 46.
v. Weed, 9 Johns. 310, § 292.
Johnston v. State, 7 Mo. 183, § 96.
Johr v. People, 26 Mich. 427, §§ 116, 172.
Jones v. Hook, 47 Mo. 329, § 291.
v. Julian, 12 Ind. 274, § 414.
v. Kennedy, 11 Pick. 125, § 464.
v. People, 6 Park. Cr. 126, §§ 326, 368.
v. Post, 6 Cal. 102, § 342.
v. Robbins, 8 Gray, 344, §§ 43, 95, 97, 101.
v. State, 1 Blackf. 317, § 194.
v. State, 2 Blackf. 476, § 47.
v. State, 1 Kelley, 610, §§ 106, 162.
v. State, 2 Swan, 399, § 437.
v. State, 13 Tex. 168, § 402.
v. Turpin, 6 Heisk. 181, § 343.
v. Venzandt, 2 McLean, 611, § 165.
Jordan v. Coffield, 70 N. C. 110, § 299.
v. Pollock, 14 Geo. 145, § 284.
v. State, 22 Geo. 545, §§ 116, 192, 417.
Journey v. Sharp, 4 Jones, 165, § 265.
Judah v. Vincennes University, 23 Ind. 273, § 214.
Judge v. Le Claire, 31 Mo. 127, § 302.
v. State, 8 Geo. 173, § 130.
v. Stone, 44 N. H. 593, § 222.

K.

- Karber v. Nellis*, 22 Wis. 215, § 338.
Karr v. Parks, 40 Cal. 188, § 297.
Keddie v. Moore, 2 Murph. 41, § 100.
Keeler v. Ins. Co. 16 Wis. 523, § 281.
Keenan v. State, 8 Wis. 132, § 396.
Keener v. Kauffman, 16 Md. 296, § 289.
v. State, 18 Geo. 194, § 198.
Keithler v. State, 10 Sm. & M. 192, §§ 365, 366.
Keitler v. State, 4 Greene, 291, § 47.
Keller v. N. Y. Cent. R. R. Co. 2 Abb. App. Dec. 480, § 295.
Kelley v. People, 55 N. Y. 565, §§ 115, 171.
Kelly v. People, 39 Ill. 157, § 59.
v. State, 3 Sm. & M. 518, § 134.
Kelsea v. Haines, 41 N. H. 247, § 291.
Kelsey v. Oil Co. 45 N. Y. 505, § 355.
Kennedy v. People, 39 N. Y. 245, § 431.
v. R. R. Co. 36 Mo. 351, § 314.
v. Raught, 6 Minn. 235, § 454.
Kenney v. People, 31 N. Y. 330, § 122.
Kenyon v. Sutherland, 3 Gilm. 99, § 251.
Kerley v. West, 3 Litt. 362, § 352.
Ketchum v. Ebert, 33 Wis. 611, § 324.

- Kidd v. Cromwell*, 17 Ala. 648, § 300.
Killen v. Sistrunk, 7 Geo. 283, § 404.
Kimball v. Connor, 3 Kan. 414, § 98.
Kincade v. Bradshaw, 3 Hawk. 63, § 335.
King v. Bailey, 6 Mo. 575, § 268.
 v. Ins. Co. 1 Conn. 353, § 279.
 v. King, 37 Geo. 205, §§ 291, 313.
 v. Root, 4 Wend. 113, § 265.
 v. State, 5 How. (Miss.) 730, § 55.
 v. Wright, 8 T. R. 298, § 265.
Kingsbury v. Buchanan, 11 Iowa, 398, § 302.
Kinnie v. Kinnie, 4 Conn. 102, § 472.
Kinny v. People, 31 N. Y. 530, § 134.
Kinsley v. Coyle, 58 Penn. St. 451, § 438.
Kirby v. State - Yerg. 279, § 431.
Kirk v. State, 1 Coldw. 344, § 80.
Kirkland v. Dinsmore, 4 Thomp. & C. 304, § 285.
Kissam v. Forest, 25 Wend. 651, § 232.
Kissinger v. R. R. Co. 56 N. Y. 538, § 314.
Kitrol v. State, 9 Fla. 9, § 44.
Kitter v. People, 25 Ill. 42, § 201.
Kleinback v. State, 2 Speers, 418, § 163.
Klingensmith v. Exrs. 31 Penn. St. 461, § 274.
Klock v. People, 2 Park. Cr. 676, § 96.
Knibb v. Dixon, 1 Rand. 249, § 92.
Knickerbocker M. Co. v. Hall, 3 Nev. 194, § 415.
Knight v. Campbell, 62 Barb. 16, § 100.
 v. Clements, 45 Ala. 89, §§ 314, 337.
 v. Freeport, 13 Mass. 218, § 390.
Knowles v. People, 15 Mich. 408, § 336.
 v. Scribner, 57 Me. 497, § 335.
Knowlton v. McMahon, 13 Minn. 386, § 408.
Koeltz v. Bleckman, 46 Mo. 320, § 417.
Koenig v. Katz, 37 Wis. 153, § 318.
Koppikus v. Commrs. 16 Cal. 248, § 87.
Krebs v. O'Grady, 23 Ala. 732, § 275.
Kuhlman v. Medlinka, 29 Tex. 385, § 437.
Kuns v. Young, 34 Penn. St. 60, § 302.
- L.
- Laber v. Cooper*, 7 Wall. 565, § 340.
Ladd v. Prentice, 14 Conn. 109, § 115.
La Farge v. Mansfield, 31 Barb. 347, § 289.
Lafayette, &c. Co. v. New Albany, &c. R. R. Co. 13 Ind. 90, §§ 118, 171.
Lake Eric, &c. R. R. Co. v. Heath, 9 Ind. 158, §§ 51, 87, 104.
Lake Shore, &c. R. R. Co. v. Miller, 25 Mich. 274, § 295.
Lamar v. Glawson, 38 Geo. 252, § 320.
 v. Williams, 39 Miss. 342, § 316.
Lamb v. Irwin, 69 Penn. St. 436, § 274.
 v. Society, 20 Iowa, 505, § 439.
Lambert v. Taylor, 6 D. & R. 196, § 63.
Lancaster v. State, 3 Cold. 343, § 344.
Lane v. Ironmonger, 13 M. & W. 366, § 299.
 v. Kingsbury, 11 Mo. 402, § 268.
 v. R. R. Co. 14 Gray, 143, § 354.
Langley v. Warner, 3 Comst. 327, § 438.
Lapresse v. Falls, 7 Ind. 692, § 91.
Largan v. Central R. R. Co. 40 Cal. 272, § 228.
Larkin v. Mann, 2 Paige, 27, § 92.
Larne v. Russell, 26 Ind. 386, § 320.
Larned v. Hudson, 57 N. Y. 151, § 342.
Latham v. Westervelt, 26 Barb. 256, §§ 275, 302.
Lavenburg v. Harper, 5 Cush. 299, § 313.
Law v. Cross, 1 Black, 533, § 339.
Lawler v. Norris, 28 Ala. 675, § 323.
Lawrence v. Barker, 5 Wend. 301, § 245.
 v. Ocean Co. 11 Johns. 241, § 288.
Lawyer v. Loomis, 3 Thomp. & C. 393, § 271.
Lea v. Beatty, 8 Dana, 207, § 91.
 v. White, 4 Sneed, 111, § 255.
Leaptrop v. Robertson, 44 Geo. 46, § 314, 344.
Leathers v. State, 46 Miss. 73, § 46.
Lee v. Lee, 71 N. C. 139, § 144.
 v. State, 26 Ark. 260, § 486.
 v. State, 45 Miss. 114, §§ 184, 185.
Leech v. Armitage, 2 Dall. 125, § 214.
Leese v. Clark, 20 Cal. 387, § 437.
Leete v. Gresham Life Ins. Co. 7 Eng. L. & Eq. 578, § 212.
Leffer v. Field, 50 Barb. 407, § 236.
Legg's case, Kelyng. 27, § 331.
Legg v. Drake, 1 Ohio St. 286, § 251.
Lehigh, &c. R. R. Co. v. Hall, 61 Penn. St. 361, § 298.
Leighton v. Sargent, 31 N. H. 119, § 401.
Lenoir v. South, 10 Ired. 237, § 447.
Le Roy v. Ins. Co. 39 N. Y. 90, § 281.
Letcher v. Norton, 5 Ill. 575, § 267.
Levi v. Brannan, 39 Cal. 485, § 270.
 v. Milne, 4 Bing. 195, § 385.
Lewis v. Blake, 10 Bosw. 198, § 473.
 v. Farrish, 2 Miss. 547, § 444.
 v. Garrett's Admr. 5 How. (Miss.) 434, §§ 103, 109.
 v. Lewis, 9 Ind. 105, § 365.
 v. Marshall, 7 M. & G. 743, §§ 308, 309.
 v. Palmer, 28 N. Y. 271, § 226.

- Lewis v. Reed*, 6 Ark. 428, § 471.
 v. State, 3 Head, 127, § 139.
 v. State, 9 S. & M. 115, § 140.
 v. Thomas, 3 Hare, 26, § 94.
Lewis' case, 4 Greenl. 448, § 56.
Lexington F. Ins. Co. v. Paver, 16 Ohio, 324, § 213.
Lincoln v. Lincoln, 12 Gray, 45, § 417.
 v. Wright, 23 Penn. St. 76, § 325.
Lindsay v. Lindsay, 11 Vt. 621, § 291.
Lindsley v. Europ. Pet. Co. 3 Lans. 176, § 222.
Lineweaver v. Stoever, 17 S. & R. 297, § 432.
Lingo v. State, 29 Geo. 470, § 144.
Linn v. Wright, 18 Tex. 317, § 317.
Lisbon v. Bath, 23 N. H. 1, § 473.
List v. Kortepeter, 26 Ind. 27, § 214.
Litchfield v. Londonderry, 39 N. H. 247, § 457.
Little v. Bishop, 9 B. Mon. 240, § 447.
 v. Commonwealth, 25 Gratt. 921, § 187.
 v. Thompson, 2 Greenl. 128, § 216.
Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110, § 313.
Littlefield v. Peckham, 1 R. I. 500, § 102.
Livingston v. Mayor, &c. 8 Wend. 100, § 83.
Lodge v. Jennings, Gilb. Eq. 255, § 436.
Loew v. Stocker, 61 Penn. St. 347, § 436.
Loggins v. Buck, 33 Tex. 113, § 213.
Lombard v. Martin, 10 Geo. 147, § 314.
London Savings Fund v. Hagerstown Bank, 36 Penn. St. 507, § 275.
Long v. Lewis, 16 Geo. 154, § 472.
Longacre v. State, 2 How. (Miss.) 637, § 445.
Longmore v. R. R. Co. 19 C. B. N. S. 183, § 297.
Lonsdale v. Brown, 4 Wash. 148, § 404.
Looper v. Bell, 1 Head, 373, § 203.
Lord v. Brown, 5 Denio, 345, § 183.
 v. State, 37 Me. 177, § 102.
 v. State, 16 N. H. 325, § 452.
Loring v. Willis, 4 How. 383, § 314.
Lott v. Macon, 2 Strobb. 178, § 404.
Louisville R. R. Co. v. Lickings, 5 Bush, 1, § 294.
Love v. Moody, 68 N. C. 200, § 390.
Lovell v. State, 45 Ind. 550, §§ 54, 424.
Loyd v. Hannibal, &c. R. R. Co. 53 Mo. 509, § 250.
Lubeck v. Bullock, 24 Cal. 338, § 473.
Lucas v. Daniels, 34 Ala. 189, § 289.
 v. R. R. Co. 6 Gray, 64, § 297.
Luckhardt v. Ogden, 30 Cal. 547, § 287.
Luman v. Karr, 4 Greene, 159, § 316.
Luster v. State, 11 Humph. 169, § 410.
Luttrell v. R. R. Co. 18 B. Mon. 291 § 391.
Lycoming Ins. Co. v. Sailer, 67 Penn. St. 108, § 283.
Lyle v. Rollins, 25 Cal. 437, § 472.
Lyles v. State, 41 Tex. 172, § 118.
Lyman v. State, 45 Ala. 72, § 140.
 v. U. S. Bank, 12 How. 225, § 292.
Lynch v. Horry, 1 Bay, 229, § 170.
 v. State, 9 Ind. 541, § 254.

M.

Mackey v. Ford, 5 H. & N. 792, § 255.
 v. Rhinelanders, 1 Johns. Cas. 408, § 286.
 v. State, 3 Ohio N. S. 362, § 54.
Macklot v. Dubreuil, 9 Mo. 473, § 289.
Macomber v. Parker, 14 Pick. 497, § 267.
Magee v. Cormack, 13 Ill. 289, § 288.
 v. Mark, 11 Ir. C. L. 449, § 335.
Mahan v. State, 10 Ohio, 223, § 164.
Maher v. State, 3 Minn. 444, § 202.
 v. State, 1 Port. 265, § 46.
Major v. State, 4 Sneed, 597, § 183.
Malison v. State, 6 Mo. 399, § 161.
Malone v. State, 49 Geo. 210, § 130.
Maloy v. N. Y. Cent. R. R. Co. 58 Barb. 182, § 298.
Malthy v. R. R. Co. 16 Md. 422, § 316.
Manby v. Scott, 1 Sid. 122, § 299.
Mangam v. Bell, 20 La. An. 215, § 276.
 v. R. R. Co. 36 Barb. 236, § 297.
Manhattan Co. v. Lydig, 2 Caines, 380, § 72.
Manix v. Malony, 7 Iowa, 81, §§ 406, 410.
Mann v. Glover, 2 Green, 195, §§ 167, 184, 194.
Mansell v. Queen, 8 Ell. & B. 54, § 139.
Maples v. Park, 17 Conn. 333, § 136.
March v. Portsmouth, &c. R. R. Co. 19 N. H. 372, § 169.
Maria v. State, 28 Tex. 698, § 328.
Markle v. Akron, 14 Ohio, 589, § 43.
Markward v. Doriat, 21 Ohio St. 637, § 418.
Marks v. Gray, 42 Me. 86, § 271.
Marsh v. Coppuck, 9 C. & P. 480, § 155.
 v. State, 30 Miss. 627, § 140.
Marshall v. Thompson, 2 Munf. 412, § 91.
 v. Wells, 7 Wis. 1, § 222.
Marston v. Brackett, 9 N. H. 336, §§ 91, 94.
 v. Marston, 54 Me. 476, § 268.
 v. Vulture, 8 Bosw. 129, § 267.
Martin v. Angell, 8 Barb. 407, § 302.

- Martin v. Cope*, 28 N. Y. 180, § 301.
v. Ordorf, 22 Iowa, 504, § 250.
v. State, 25 Geo. 494, § 387.
v. State, 16 Ohio, 364, §§ 139, 178.
Mask v. State, 36 Miss. 77, § 331.
Maaten v. Deyo, 2 Wend. 425, § 271.
Masters v. Town of Warren, 27 Conn. 300, § 313.
Mathilde v. Levy, 24 La. An. 421, § 362.
Matter of Green, 16 Ill. 234, § 450.
Matter of Kerrigan, 4 Vroom, 344, § 103.
Matthews v. Rice, 31 N. Y. 460, § 269.
Mattus v. Shields, 2 Met. (Ky.) 553, § 300.
Maverick v. Salinas, 15 Tex. 57, § 269.
May v. State, Minor, 28, § 60.
v. Walter, 56 N. Y. 8, § 268.
v. Williams, 17 Ala. 23, § 248.
Mayfield v. Cotton, 37 Tex. 229, § 251.
Mayor, &c. v. Trimble, 25 Md. 18, § 316.
Mayor v. Goetchins, 7 Geo. 139, § 169.
Mayson v. Sheppard, 12 Rich. 254, § 415.
McAlpine v. State, 47 Ala. 78, § 332.
McAnnulty, Ex parte, Charlt. 310, § 66.
McAndrews v. Santee, 7 Abb. Pr. N. S. 408, § 304.
McArthur v. Porter, 6 Pet. 205, § 447.
McCaleb v. Smith, 22 Iowa, 242, § 338.
McCall v. Davis, 56 Penn. St. 433, § 269.
McCartney v. McMullen, 38 Ill. 237, § 320.
McCauley v. State, 26 Ark. 135, § 484.
McClear v. State, New Sup. Ct. § 187.
McClintock v. Curd, 32 Mo. 411, § 220.
McClosky v. People, 5 Park. Cr. 308, § 153.
McClune v. Cain, 2 Keyes, 203, § 274.
McClurg v. Kelley, 21 Iowa, 508, § 290.
McClurkin v. Ewing, 42 Ill. 283, § 363.
McComus v. Cov. Mut. Ins. Co. 56 Mo. 573, § 187.
McConnells v. Delaware Ins. Co. 18 Ill. 228, § 335.
McCormick v. Brookfield, 1 South. 69, § 192.
McCoy v. State, 22 Ark. 308, § 201.
McCracken v. Roberts, 19 Penn. St. 390, § 352.
McCraven v. McGuire, 23 Miss. 100, § 447.
McCready v. Wright, 5 Duer, 575, § 274.
McCreary v. Commonwealth, 29 Penn. St. 323, § 395.
McCuller v. State, 49 Ala. 39, § 202.
McCullough v. Commonwealth, 67 Penn. St. 30, § 52.
McDermott v. Hoffman, 70 Penn. St. 31, §§ 75, 163.
McDonald v. Schell, 6 S. & R. 240, § 101.
v. Shaw, Coxe, 6, § 149.
McDougald v. Dougherty, 11 Geo. 570, § 89.
McEwen v. Morey, 60 Ill. 32, § 350.
McFadden v. Commonwealth, 23 Penn. St. 12, §§ 189, 194.
McFerran v. Taylor, 3 Cranch, 280, § 446.
McGear v. Woodruff, 33 N. J. 213, §§ 82, 95, 99.
McGehee v. Shaffer, 9 Tex. 20, § 189.
McGinnis v. Kempsey, 27 Mich. 363, §§ 220, 247.
McGowan v. Jones, R. M. Charlt. 84, § 91.
v. State, 9 Yerg. 184, §§ 165, 380.
McGrath v. Herndon, 4 T. B. Mon. 480, § 471.
v. Isaacs, 2 McCord, 26, § 107.
McGregg v. State, 4 Blackf. 101, § 458.
McGregor v. Armill, 2 Clarke, 30, § 416.
v. Armill, 2 Iowa, 30, § 314.
McGuffie v. State, 17 Geo. 497, §§ 58, 143, 192, 381, 422.
McGuire v. State, 37 Ala. 164, § 201.
v. State, 37 Miss. 369, §§ 139, 333.
McIlvaine v. Wilkins, 12 N. H. 474, § 389.
McIntire v. Hussey, 57 Me. 493, § 391.
McKanna v. Merry, 61 Ill. 177, § 299.
McKean v. Wagenblast, 2 Gratt. 462, § 301.
McKenzie v. Bank, 28 Ala. 606, § 318.
v. State, 26 Ark. 334, § 486, 487.
McKeon v. R. R. Co. 42 Mo. 79, § 348.
McKinney v. Hartman, 4 Iowa, 154, § 312.
v. Rhoads, 5 Watts, 343, § 291.
McLain v. State, 10 Yerg. 241, § 396.
McLaren v. Birdsong, 24 Geo. 265, § 175.
McLean v. Clark, 47 Geo. 24, § 312.
v. Copper, 3 Cull, 367, § 438.
McLees v. Felt, 11 Ind. 218, § 214.
McLellan v. Crofton, 6 Greenl. 307, § 174.
v. State, 22 Tex. 409, § 418.

- McMillan v. Birch, 1 Binn. 178, § 255.
 v. State, 35 Geo. 54, § 469.
 McMullan, v. McKenzie, 2 Greene, 368, § 274.
 McNab v. Lockhart, 18 Geo. 495, § 250.
 McNaghlen's case, 10 Cl. & Fin. 200, § 228.
 McNamara v. N. P. R. R. Co. 50 Cal. 581, § 297.
 McNeveins v. People, 61 Barb. 307, § 328.
 McPherson v. State, 22 Geo. 478, § 381.
 McQuillen v. State, 8 S. & M. 587, § 50.
 McRae v. Morrison, 13 Ired. 46, § 368.
 Mead v. McGraw, 19 Ohio St. 55, § 364, 421.
 Meade v. Smith, 16 Conn. 356, § 408.
 Means v. Means, 5 Strobb. 167, § 368.
 Mechanics' Bank v. New York, &c. R. Co. 13 N. Y. 597, § 275.
 Meehan v. Forrester, 52 N. Y. 277, § 276.
 Mehlberg v. Fisher, 24 Wis. 607, § 292.
 Meixsell v. Williamson, 35 Ill. 529, § 364.
 Melhuish v. Collier, 15 Q. B. 878, § 231.
 Mellish v. Rawdon, 9 Bing. 423, § 264.
 Memphis, &c. R. R. Co. v. Bibb, 37 Ala. 699, § 355.
 Mendelsohn v. Anaheim L. Co. 40 Cal. 657, § 418.
 Mercer v. Whall, 6 C. & P. 64, § 212.
 v. Whall, 5 Q. B. 447, § 222.
 v. Wright, 3 Wis. 645, § 364.
 Meredith v. Crawford, 34 Ind. 399, § 349.
 Merriam v. Cunningham, 11 Cush. 40, § 299.
 Merrill v. Navy, 10 Allen, 416, § 404.
 Mesmer v. Commonwealth, 26 Gratt. 976, § 46.
 Meyer v. R. R. Co. 40 Mo. 151, § 319.
 v. State, 19 Ark. 156, § 185.
 Middleton v. Quigley, 7 Halst. 352, § 446.
 v. Sherburne, 4 Y. & C. 358, § 90.
 Middletown v. Ames, 7 Vt. 169, § 169.
 Miles v. Douglas, 34 Conn. 393, § 313.
 v. Pulver, 3 Denio, 84, § 154.
 v. Rose, 1 Hemp. 37, § 201.
 Millard v. Hall, 24 Ala. 409, § 268.
 v. Lyons, 25 Wis. 516, § 350.
 Millbank v. Dennistown, 21 N. Y. 386, § 275.
 Miller v. Ins. Co. 2 E. D. Smith, 268, § 283.
 v. State, 33 Miss. 356, § 46.
 v. Stewart, 24 Cal. 502, § 265.
 v. Wilson, 24 Penn. St. 114, § 198.
 Millerd v. Thorne, 56 N. Y. 402, § 214.
 Milne v. Henry, 40 Penn. St. 352, § 266.
 v. Huber, 3 McLean, 312, § 421.
 Milner v. Wilson, 45 Ala. 478, § 350.
 Milton v. Rowland, 11 Ala. 732, § 314.
 Minnesota v. Parrant, 16 Minn. 178, § 394.
 Mitchell v. Denbo, 3 Blackf. 259, § 126.
 v. Likens, 3 Blackf. 258, § 126.
 v. New Eng. M. Ins. Co. 6 Pick. 117, § 107.
 v. State, 22 Geo. 211, § 452.
 v. Tolley, 4 Kan. 117, § 478.
 Mitchin v. State, 11 Geo. 615, § 270.
 Mitchinson v. Cross, 58 Ill. 366, § 271.
 Mix v. Ins. Co. 11 Ind. 117, § 293.
 Moloney v. Evans, 51 Penn. St. 80, § 299.
 Monroe v. State, 23 Tex. 210, §§ 183, 187.
 v. Twistleton, Pea. Add. Cas. 221, § 246.
 Montague v. Commonwealth, 10 Gratt. 767, § 140.
 Montgomery v. Erwin, 24 Ark. 540, § 316.
 v. State, 40 Ala. 684, § 423.
 v. State, 11 Ohio, 424, § 200.
 Moore v. Cass, 10 Kan. 288, §§ 118, 173.
 v. Cherry, 1 Bay, 269, § 474.
 v. Foster, 10 B. Mon. 255, § 472.
 Moody v. Rowell, 17 Pick. 498, § 227.
 v. State, 1 W. Va. 337, § 423.
 Morford v. Barnes, 8 Yerg. 444, § 101.
 Morgan v. Livingston, 2 Rich. 573, § 419.
 v. Peet, 32 Ill. 281, § 340.
 v. State, 19 Ala. 556, § 44.
 v. State, 48 Ala. 65, § 396.
 Morris v. Hall, 41 Ala. 510, § 320.
 v. Howe, 36 Iowa, 490, § 405.
 v. Platt, 32 Conn. 75, § 311.
 v. State, 3 Humph. 333, § 409.
 v. State, 38 Tex. 603, § 202.
 Morrison v. Erie R. R. Co. 56 N. Y. 302, § 295.
 Morse v. Gilman, 18 Wis. 373, § 317.
 v. R. R. Co. 65 Barb. 491, § 357.
 v. Weymouth, 28 Vt. 824, § 301.
 Morse v. Sherill, 63 Barb. 21, § 473.
 Morton v. State, 1 Kan. 468, § 176.
 Moses v. State, 11 Humph. 232, §§ 174, 185.
 Moshier v. R. R. Co. 8 Barb. 427, § 298.
 Moss v. Shear, 30 Cal. 467, § 305.
 Mounce v. Byans, 11 Geo. 180, § 89.
 Mountford v. Hall, 1 Mass. 443, § 98.
 Mowry v. Starbuck, 4 Cal. 274, § 136.
 v. Stogner, 3 S. C. 251, § 325.
 Mulcahy v. Queen, 1 Ir. Com. L. 13, § 173.
 Mullaly v. Austin, 97 Mass. 30, § 352.

- Mullins v. State*, 37 Tex. 337, § 265.
Munroe v. Brigham, 19 Pick. 368, § 118.
Munshower v. Patton, 10 S. & R. 334, § 150.
Munson v. Reed, 1 Clarke, 580, § 91.
Murphy v. Commonwealth, 2 Metc. (Ky.) 365, § 113.
 v. People, 2 Cow. 815, §§ 95, 96.
 v. People, 37 Ill. 447, §§ 118, 270, 340.
Murray v. Walker, 44 Geo. 58, § 276.
Murrell v. Whiting, 32 Ala. 54, § 288.
Mushower v. Patton, 10 S. & R. 334, §§ 134, 150.
Musselman v. Pratt, 44 Ind. 126, § 254.
Mutual, &c. Ins. Co. v. Deal, 18 Md. 26, § 281.
Mutual Ins. Co. v. Wise, 34 Md. 582, § 283.
Myers v. Farrell, 47 Miss. 281, § 372.
 v. R. R. Co. 43 Me. 232, § 300.

N.

- Nabors v. State*, 6 Ala. 200, § 425.
Naglee v. Ingersoll, 7 Barr, 185, § 304.
Naugatuck R. R. Co. v. Waterbury B. Co. 24 Conn. 468, § 107.
Needham v. Dowling, 15 L. Jour. C. P. 9, § 255.
Nelms v. State, 13 Sm. & M. 500, §§ 185, 390.
Nels v. State, 2 Tex. 280, § 381.
Nelson v. People, 23 N. Y. 293, § 448.
 v. State, 2 Swan, 482, § 380.
Nerot v. Wallace, 3 T. R. 25, § 419.
Nesmith v. Ins. Co. 8 Abb. Pr. 141, § 390.
Neville v. Northcutt, 7 Coldw. 294, § 415.
Nevins v. Bank, 10 Mich. 547, § 284.
Newcomb v. Griswold, 24 N. Y. 298, § 242.
Newhouse v. Miller, 35 Ind. 463, § 357.
New Jersey Ex. Co. v. Nichols, 4 Vroom, 434, § 357.
Newkirk v. State, 27 Ind. 1, § 404.
New Mfg. Co. v. Pendergast, 4 Fost. 54, § 289.
New Orleans, &c. Co. v. Dudley, 8 Paige, 459, §§ 92, 94.
Newton v. Chantler, 7 East, 138, § 266.
 v. Kerr, 4 La. An. 704, § 416.
New Windsor Turnpike Co. v. Ellison, 1 Johns. 141, § 72.
New York v. Mason, 4 E. D. Smith, 142, § 153.
Nichol v. Vaughan, 2 Dow & C. 420, § 91.
Nicholl v. Ins. Co. Wood. & Minot, 533, § 274.

- Nicholls v. Dowding*, 1 Stark. 81, § 227.
Nicholls v. Goldsmith, 7 Wend. 160, § 352.
 v. Mercer, 44 Ill. 250, § 338.
 v. Weaver, 7 Kan. 273, § 439.
Nicholson v. State, 38 Md. 140, § 309.
Nickle v. Williamson, 44 Ill. 48, § 471.
Noble v. Coleman, 16 Ala. 77, § 268.
 v. Kennaway, Doug. 510, § 286.
Nolen v. State, 2 Head, 520, § 139.
 v. Wisner, 11 Iowa, 190, § 313.
Nomaque v. People, Breese, 109, §§ 453, 465.
Norfleet v. State, 4 Sneed, 340, § 198.
Norristown, &c. Co. v. Burkett, 26 Ind. 53, § 101.
North Penn. &c. Co. v. Snowden, 42 Penn. St. 488, § 93.
Norton v. McLeary, 8 Ohio St. 205, § 100.
Norwood v. Boon, 21 Tex. 592, § 337.
Nugent v. State, 4 Stew. & P. 72, § 484.

O.

- Oakley v. Ooddeen*, 2 Fost. & F. 656, § 213.
O'Barr v. Alexander, 37 Geo. 195, § 408.
O'Brien v. Bowes, 4 Bosw. 657, § 94.
 v. Commonwealth, 9 Bush, 333, § 488.
 v. Palmer, 49 Ill. 72, §§ 413, 473.
 v. People, 36 N. Y. 277, §§ 178, 193.
O'Byrne v. State, 29 Geo. 36, § 75.
O'Callaghan v. Booth, 6 Cal. 63, § 289.
Oclaney v. Milwaukee, &c. R. R. Co. 33 Wis. 67, § 295.
O'Conner v. Guthrie, 11 Iowa, 80, § 348.
O'Connor v. State, 9 Fla. 215, §§ 144, 173, 189, 203.
Ogle v. State, 33 Miss. 383, § 185.
O'Hara v. Richardson, 46 Penn. St. 385, § 289.
Oldfield v. New York, &c. R. R. Co. 3 E. D. Smith, 103, § 297.
O'Leary v. People, 17 How. Pr. 316, § 448.
Olson v. Meader, 40 Iowa, 662, § 390.
Oliver v. Chapman, 15 Tex. 400, § 265.
 v. Pate, 43 Ind. 132, § 270.
 v. State, 17 Ala. 587, § 265.
 v. Williams, 25 Geo. 217, § 289.
O'Mara v. Commonwealth, 75 Penn. St. 424, § 146.
O'Neil v. State, 48 Geo. 66, § 325.
Opdyke v. Stephens, 4 Dutch. 83, § 305.
 v. Weed, 18 Abb. Pr. 223, § 212.
Ormsby v. People, 53 N. Y. 472, § 337.
Ortiz v. Jewett, 23 Ala. 662, § 245.

- Osborn v. Forshee, 22 Mich. 209, § 226.
 v. State, 24 Ark. 629, § 80.
 Oswald v. Kennedy, 48 Penn. St. 9, § 342.
 Ott v. Soulard, 9 Mo. 581, § 305.
 Ottawa, &c. Co. v. Thompson, 29 Ill. 598, § 470.
 Ousig v. Hardin, 23 Ill. 403, § 343.
 Owen v. Owen, 22 Iowa, 270, § 311.
 v. Warburton, 1 N. R. 326, § 408.
 Owens v. Hannibal R. R. Co. 58 Mo. 386, § 294.
- P.
- Pacheco v. Hunsacker, 14 Cal. 120, §§ 72, 134.
 Paddock v. Cameron, 8 Cow. 212, § 64.
 v. Wells, 2 Barb. Ch. 331, § 174.
 Page v. Coontocook R. R. Co. 1 Fost. 438, § 169.
 v. Inhabitants of Danvers, 7 Met. 326, § 121.
 v. Lewis, 26 Me. 360, § 119.
 v. Parker, 40 N. H. 47, § 226.
 Paige v. O'Neil, 12 Cal. 483, § 449.
 Pannell v. State, 29 Geo. 681, § 139.
 Pantou v. Williams, 2 Q. B. 169, § 271.
 Parker v. Commonwealth, 8 B. Mon. 30, § 423.
 v. Fergus, 52 Ill. 419, § 337.
 v. Fisher, 39 Ill. 164, §§ 415, 418, 423.
 v. Jenkins, 3 Bush, 587, §§ 342, 351.
 v. Leman, 10 Tex. 116, §§ 352, 416.
 v. Mitchell, 31 Barb. 469, § 255.
 v. Thornton, 1 Str. 640, § 144.
 Parkhurst v. Lowten, 1 Meriv. 400, § 241a.
 Parkin v. Moon, 7 C. & P. 408, § 226.
 Parks v. Boston, 15 Pick. 209, § 371.
 v. State, 4 Ohio St. 234, § 135.
 Parr v. Gibbons, 27 Miss. 375, § 471.
 Parsons v. Bedford, 3 Peters, 446, § 83.
 v. Huff, 41 Me. 410, § 364.
 v. State, 22 Ala. 50, § 139.
 Patchin v. Sands, 10 Wend. 570, § 72.
 Pate v. Wright, 30 Ind. 479, §§ 349, 350.
 Patrick v. Admr. 27 Tex. 579, § 289.
 Patterson v. Boston, 20 Pick. 159, § 371.
 v. State, 2 Eng. 60, §§ 200, 380.
 v. U. S. 2 Wheat. 221, § 444.
 Patterson's case, 6 Mass. 486, § 136.
 Paton v. Hamilton, 12 Ind. 256, § 214.
 Paulette v. Brown, 40 Mo. 52, §§ 241a, 364.
 Paxton v. Bailey, 17 Geo. 600, § 289.
- Paxton v. Douglass, 19 Ves. 225, § 244.
 Payne v. Billingham, 10 Iowa, 360 § 340.
 v. Commonwealth, 1 Met. (Ky.) 370, § 328.
 v. Greene, 10 Sm. & M. 508, § 313.
 v. State, 3 Humph. 375, § 184.
 Peabody v. Hewitt, 52 Me. 33, § 464.
 Peacham v. Carter, 21 Vt. 515, § 405.
 Pearson v. Coles, 1 M. & Rob. 206, § 214.
 Peck v. Bacon, 18 Conn. 387, § 269.
 v. Crouse, 46 Barb. 151, § 268.
 v. The Freeholder, 1 Spencer, 457, § 154.
 v. Yorks, 47 Barb. 131, § 242.
 Peham v. Page, 1 Eng. 535, § 387.
 Pennell v. Dawson, 18 C. B. 355, § 323.
 Pennsylvania v. Bell, Add. 173, § 60.
 Penn. Canal Co. v. Bentley, 66 Penn. St. 30, § 295.
 Penn v. Oliphant, Addis. 345, § 56.
 Penn. R. R. Co. v. Lutheran Cong. 53 Penn. St. 445, § 104.
 People v. Ah Fong, 12 Cal. 345, § 350.
 v. Ah Kim, 34 Cal. 189, § 432.
 v. Ah Sing, Supreme Ct. Cal. § 334.
 v. Ah Who, 49 Cal. 32, § 247.
 v. Ah Zi, 9 Cal. 16, § 471.
 v. Allen, 43 N. Y. 28, § 176.
 v. Anderson, 44 Cal. 65, § 251.
 v. Arceo, 32 Cal. 40, § 140.
 v. Ash, 44 Cal. 288, § 332.
 v. Atchinson, 7 How. Pr. 241, § 161.
 v. Bagnell, 31 Cal. 409, § 325.
 v. Barker, 3 Wheel. Cr. 19, §§ 406, 410.
 v. Bennett, 37 N. Y. 117, § 46.
 v. Bennett, 49 N. Y. 137, § 353.
 v. Bernal, 10 Cal. 66, § 308.
 v. Bodine, 1 Denio, 281, §§ 165, 183, 187, 191.
 v. Boggs, 20 Cal. 432, § 390.
 v. Bonney, 19 Cal. 427, §§ 328, 439.
 v. Boughton, 1 Edm. Sel. Cas. 140, § 193.
 v. Brannon, 47 Cal. 96, § 324.
 v. Budge, 4 Park. Cr. 519, § 66.
 v. Cage, 48 Cal. 323, § 491.
 v. Campbell, 40 Cal. 129, § 427.
 v. Caniff, 2 Park. Cr. 536, § 161.
 v. Carroll, 3 Park. Cr. 22, § 102.
 v. Christie, 2 Park. Cr. 579, § 196.
 v. Coffman, 24 Cal. 230, §§ 198, 211.
 v. Collins, 20 How. Pr. 111, § 67.

People v. Colt, 3 Hill, 432, § 143.
 v. Common Pleas, 1 Wend. 297, § 408.
 v. Costello, 1 Denio, 83, § 365.
 v. Cottle, 6 Cal. 227, § 183.
 v. Cowles, 3 Abb. App. Dec. 507, § 103.
 v. Coyodo, 40 Cal. 586, § 152.
 v. Cronin, 34 Cal. 191, § 336.
 v. Damon, 13 Wend. 351, § 178, 489.
 v. Daniell, 50 N. Y. 274, § 97.
 v. Davis, 47 Cal. 93, § 138.
 v. Davis, 36 N. Y. 77, 423.
 v. Devine, 44 Cal. 452, § 452.
 v. Devine, 46 Cal. 46, §§ 135, 138.
 v. Dewick, 2 Park. Cr. 230, § 192.
 v. Dodge, 30 Cal. 450, § 339.
 v. Doe, 1 Mann. 451, § 149.
 v. Doesbury, 17 Mich. 135, § 444.
 v. Donahue, 45 Cal. 321, § 331.
 v. Douglass, 4 Cow. 26, §§ 395, 400.
 v. Dyle, 21 N. Y. 578, § 336.
 v. Earnest, 45 Cal. 29, § 46.
 v. Finnegan, 1 Park. Cr. 147, § 378.
 v. Fisher, 20 Barb. 652, §§ 95, 97.
 v. Fuller, 2 Park. Cr. 16, § 129.
 v. Garnett, 29 Cal. 622, § 329.
 v. Gates, 13 Wend. 311, § 246.
 v. Gatewood, 20 Cal. 146, § 46.
 v. Gehr, 8 Cal. 359, § 183.
 v. Geiger, 49 Cal. 643, § 47.
 v. Goodrich, 3 Park. Cr. 518, § 473.
 v. Goodwin, 5 Wend. 250, § 96.
 v. Goodwin, 18 Johns. 188, §§ 483, 486, 487.
 v. Green, 13 Wend. 55, §§ 483, 486.
 v. Griffin, 2 Barb. 427, § 44.
 v. Hamilton, 39 N. Y. 107, § 163.
 v. Hartung, 26 N. Y. 154, § 467.
 v. Hayes, 1 Edm. Sel. Cas. 582, §§ 167, 184.
 v. Henrica, 1 Park. Cr. 579, § 161.
 v. Herrick, 13 Johns. 84, § 242.
 v. Hobson, 17 Cal. 424, § 346.
 v. Hoffman, 3 Mich. 248, §§ 98, 101.
 v. Holdridge, 4 Lans. 511, § 119.
 v. Hulbut, 4 Denio, 133, § 53.
 v. Hurley, 8 Cal. 392, § 340.
 v. Hyley, 2 Park. Cr. 566, § 68.
 v. Ins. Co. 2 Thomp. & C. 268, § 280.
 v. Irving, 1 Wend. 20, § 244.
 v. Ivey, 49 Cal. 56, § 380.

People v. Jackson, 3 Hill, 92, § 430.
 v. Jewett, 3 Wend. 314, §§ 47, 154, 175.
 v. Johnson, 2 Park. Cr. 322, § 97.
 v. Johnston, 48 Cal. 549, §§ 44, 58.
 v. Johnston, 2 Wheel. C. C. 367, § 183.
 v. Jones, 24 Mich. 215, § 138.
 v. Keenan, 13 Cal. 581, § 254.
 v. Kelley, 46 Cal. 356, §§ 397, 451.
 v. King, 27 Cal. 507, § 187.
 v. King, 28 Cal. 265, § 112.
 v. Kohle, 4 Cal. 198, § 165.
 v. Lachansais, 32 Cal. 433, § 332.
 v. Lane, 6 Abb. Fr. N. S. 105, § 100.
 v. Lohman, 2 Barb. 216, § 193.
 v. Lopez, 26 Cal. 112, § 55.
 v. Mallon, 3 Lans. 224, §§ 138, 185.
 v. Manning, 48 Cal. 335, § 242.
 v. March, 6 Cal. 543, § 270.
 v. Marquis, 15 Cal. 38, § 459.
 v. Masters, 3 Park. Cr. 517, § 161.
 v. Mather, 4 Wend. 229, §§ 193, 226, 241a.
 v. Mayor, 1 Wend. 36, § 454.
 v. McCalla, 8 Cal. 301, § 164.
 v. McCann, 16 N. Y. 58, § 211.
 v. McGeery, 6 Park. Cr. 653, § 427.
 v. McGuire, 43 How. Pr. 67, § 72.
 v. McKay, 18 Johns. 212, § 131.
 v. McLeod, 1 Hill, 377, § 331.
 v. McMahon, 2 Park. Cr. 663, § 193.
 v. Murray, 41 Cal. 66, § 340.
 v. Olcott, 2 Johns. Cas. 301, § 434.
 v. O'Neil, 48 Cal. 257, §§ 76, 113.
 v. Perkins, 1 Wend. 91, §§ 454, 464.
 v. Pfomer, 4 Park. Cr. § 328.
 v. Phipps, 39 Cal. 326, § 333.
 v. Quin, 1 Park. Cr. 340, § 328.
 v. Ransom, 7 Wend. 423, § 395.
 v. Rathbun, 21 Wend. 509, §§ 167, 183.
 v. Reagle, 60 Barb. 527, § 486.
 v. Reed, 48 Cal. 553, § 241a.
 v. Reyes, 5 Cal. 347, §§ 176, 181, 197.
 v. Reynolds, 16 Cal. 128, §§ 165, 181.
 v. Roberts, 6 Cal. 217, § 270.
 v. Robinson, 2 Park. Cr. 235, § 44.

- People v. Robles*, 34 Cal. 591, § 241a.
v. Rodriguez, 10 Cal. 50, § 46.
v. Rodundo, 44 Cal. 538, § 326.
v. Rogers, 13 Abb. Pr. N. S. 370, § 314.
v. Romero, 18 Cal. 89, § 47.
v. Russell, 46 Cal. 121, § 153.
v. Sanchez, 4 Park. Cr. 535, § 66.
v. Sanford, 43 Cal. 29, § 171.
v. Saxton, 22 N. Y. 309, § 265.
v. Schryner, 42 N. Y. 1, § 333.
v. Smith, 9 Mich. 193, § 113.
v. Smith, 21 N. Y. 595, § 104.
v. Snyder, 2 Park. Cr. 23, § 430.
v. Southwell, 46 Cal. 141, § 47.
v. Stein, 1 Park. Cr. 246, § 423.
v. Stewart, 7 Cal. 140, §§ 178, 380.
v. Stonecipher, 6 Cal. 408, §§ 185, 270.
v. Stout, 4 Park. Cr. 71, §§ 167, 183.
v. Strong, 1 Abb. Pr. 244, § 53.
v. Strong, 30 Cal. 151, §§ 340, 364, 366.
v. Symonds, 22 Cal. 348, § 395.
v. Tanner, 2 Cal. 257, § 178.
v. Thayers, 1 Park. Cr. 595, § 164.
v. Thompson, 34 Cal. 671, § 115.
v. Thurston, 2 Park. Cr. 49, § 154.
v. Treadway, 17 Mich. 480, § 133.
v. Turner, 39 Cal. 377, § 47.
v. Turner, 55 Ill. 280, § 108.
v. Turnpike Co. 47 N. Y. 596, § 436.
v. Tweed, 13 Abb. Pr. N. S. 371, § 165.
v. Valencia, 43 Cal. 552, § 331.
v. Vermilyea, 7 Cow. 138, § 164.
v. Videto, 1 Park. Cr. 603, § 378.
v. Welch, 49 Cal. 174, §§ 134, 149, 152.
v. Wells, 8 Mich. 104, § 422.
v. Williams, 6 Cal. 206, § 183.
v. Williams, 24 Mich. 156, § 134.
v. Wilson, 8 Abb. Pr. 187, § 405.
v. Wilson, 3 Park. Cr. 199, § 178.
v. Wyman, 15 Cal. 70, § 366.
v. Young, 31 Cal. 563, § 49.
- Peoria Ins. Co. v. Whitehill*, 25 Ill. 466, § 418.
Peri v. People, 65 Ill. 17, § 132.
Perkins v. Deacon, 13 Mich. 81, § 291.
 v. Knight, 2 N. H. 474, § 390.
Perley v. Little, 3 Greenl. 971, § 107.
Perry v. State, 9 Wis. 19, § 125.
Peter v. State, 3 How. (Miss.) 438, § 59.
- Peterson v. State*, 47 Geo. 524, § 308.
Peterson v. United States, 2 Wash. C. 36, § 441.
Pettibone v. Phelps, 13 Conn. 445, § 388.
Pettis v. Pomfret, 28 Conn. 566, § 163.
Petrie v. Hannay, 3 T. R. 659, § 464.
Pharo v. Johnson, 15 Iowa, 560, § 312.
Phillips v. Behn, 19 Geo. 298, § 416.
 v. Blake, 1 Met. 156, § 292.
 v. Hill, 3 Tex. 397, § 451.
 v. Irving, 7 M. & G. 325, § 286.
 v. Jordan, 5 Stew. 42, § 107.
 v. State, 29 Geo. 105, §§ 134, 169.
 v. Williams, 39 Geo. 597, § 362.
Phoenix Ins. Co. v. Allen, 11 Mich. 501, § 287.
Pickett v. Crook, 20 Wis. 358, § 343.
Pierce v. Hasbrouck, 49 Ill. 23, § 450.
 v. Pierce, 25 Barb. 243, § 292.
 v. Randolph, 12 Tex. 290, § 303.
 v. State, 13 N. H. 536, §§ 195, 377.
 v. State, 12 Tex. 210, § 48.
 v. Tate, 27 Miss. 283, § 201.
Piersoll v. Neill, 63 Penn. St. 420, § 352.
Pierston v. State, 12 Ala. 153, § 381.
 v. State, 11 Ind. 341, § 169.
Pike v. Dilling, 41 Me. 539, § 343.
Pilner v. State Bank, 19 Iowa, 112, § 473.
Piper's case, 2 Browne, 59, § 119.
Pipher v. Lodge, 16 Serg. & R. 214, §§ 174, 177.
Pittsburgh, &c. R. R. Co. v. Andrews, 39 Md. 329, § 294.
Pittsburgh, &c. R. R. Co. v. Evans, 53 Penn. St. 250, § 436.
Pittsburgh, &c. R. R. Co. v. McClurg, 56 Penn. St. 300, § 294.
Pittsfield v. Barnstead, 40 N. H. 477, § 198.
Plato v. Kelly, 16 Abb. Pr. 188, § 241a.
 v. People, 3 Park Cr. 586, § 95.
Pleak v. Chambers, 7 B. Mon. 565, § 473.
Pleasant v. State, 13 Ark. 360, § 380.
Plimpton v. Somerset, 33 Vt. 283, §§ 87, 98.
Pocock v. Hendricks, 8 Gill & J. 421, § 266.
Pointer v. Rust, 7 Humph. 532, § 200.
Polk v. Fancher, 1 Head. 336, § 343.
Pollen v. Le Roy, 30 N. Y. 549, § 301.
Polston v. See, 54 Mo. 291, § 335.
Pomeroy v. Sigerson, 22 Mo. 598, § 274.
 v. Winship, 12 Mass. 514, §§ 91, 92.
Ponton v. Ballard, 24 Tex. 621, § 284.
Pool v. Devers, 30 Ala. 672, § 367.
Pope v. State, 36 Miss. 121, § 402.
Porter v. Harrison, 52 Mo. 524, § 320.

- Porter v. Patterson, 15 Penn. St. 229, § 288.
 v. State, 2 Carter, 435, § 395.
 v. Wilson, 13 Penn. St. 650, § 269.
 Portis v. State, 23 Miss. 578, § 46.
 Potwine's Appeal, 31 Conn. 381, § 284.
 Poulet v. Johnson, 25 Geo. 403, § 310.
 Pound v. State, 43 Geo. 88, § 404.
 Powell v. Bigley, 14 Geo. 41, § 471.
 v. Healey, 28 Tex. 52, § 284.
 Powers v. Russell, 13 Pick. 69, § 212.
 Prater v. Sneed, 12 Kan. 447, § 350.
 Pratt v. Hull, 13 Johns. 334, § 107.
 v. Ogden, 34 N. Y. 20, § 316.
 Prentiss v. Blake, 34 Vt. 460, § 306.
 Prescott v. State, 19 Ohio St. 184, § 108.
 Preston v. Keyes, 23 Cal. 193, § 316.
 v. Walker, 26 Iowa, 205, § 222.
 Price v. Evans, 49 Mo. 396, § 471.
 Prickett v. Budger, 37 Eng. L. & Eq. 428, §§ 302.
 Priddle's case, 11 Rep. 10, § 439.
 Primm v. Haren, 27 Mo. 205, § 301.
 Prince v. State, 30 Geo. 27, § 434.
 Prindeville v. People, 42 Ill. 217, § 428.
 Pringle v. Huse, 1 Cow. 432, §§ 126, 148.
 Prior v. Powers, 1 Keb. 811, § 408.
 Pritchard v. Hennessy, 1 Gray, 294, § 460.
 Pritchett v. Overman, 3 Greene, 531, § 320.
 Prussel v. Knowles, 4 How. (Miss.) 90, § 421.
 Pugh v. McCarty, 44 Geo. 383, § 344.
 Pullen v. Boney, 4 N. J. L. 125, § 344.
 v. White, 3 C. & P. 434, § 221.
 Purcell v. Macnamara, 1 Campb. 199, § 216.
 Parinton v. Humphreys, 6 Me. 379, §§ 393, 401.
 Purple v. Horton, 13 Wend. 9, § 169.
- Q.
- Quessenbury v. State, 3 Stew. & P. 308, § 185.
 Quinebaug Bank v. Leavens, 20 Conn. 87, § 169.
 v. Tarbox, 20 Conn. 510, §§ 153, 163.
 Quinn v. State, 14 Ind. 589, § 395.
- R.
- Rafe v. State, 11 Geo. 60, §§ 106, 189.
 Railroad Co. v. Crandell, 41 Ill. 234, § 473.
 Railroad Co. v. Dewey, 26 Ill. 255, § 297.
 v. Fielding, 48 Penn. St. 318, § 298.
 v. Lockwood, 17 Wall. 357, § 284.
 v. Manley, 58 Ill. 304, § 343.
 v. McElwee, 67 Penn. St. 315, § 296.
 v. Nunn, 51 Ill. 76, § 298.
 v. Payne, 49 Ill. 499, § 345.
 v. Snyder, 24 Ohio St. 678, § 316.
 v. Stallman, 22 Ohio St. 1, § 345.
 v. Stout, 17 Wall. 69, § 296.
 v. Whitton, 13 Wall. 270, § 337.
 Rainey v. Bader, 48 Mo. 539, § 417.
 v. People, 8 Ill. 71, § 59.
 Ramadge v. Ryan, 9 Bing. 333, § 388.
 Ramage v. Peterman, 25 Penn. St. 349, § 305.
 Ramsey v. Bullock, 32 Geo. 376, § 316.
 Randall v. Kehler, 60 Me. 37, § 101.
 Randebaugh v. Shelley, 6 Ohio St. 307, § 220.
 Rank v. Shewey, 4 Watts, 218, § 174.
 Rankin v. Harper, 23 Mo. 579, § 452.
 Rathbun v. Rathbun, 3 How. Pr. 139, § 91.
 Rawlins v. Desborough, 2 M. & Rob. 328, § 212.
 Rawson v. Penn. R. R. Co. 2 Abb. Pr. N. S. 220, § 299.
 Ray v. Donnelly, 4 McLean, 504, § 367.
 v. Doughty, 4 Blackf. 116, § 91.
 v. State, 15 Geo. 223, § 183.
 v. Wooters, 19 Ill. 82, § 349.
 Raymond v. Bell, 18 Conn. 81, §§ 452, 462.
 Read v. Chelmsford, 16 Pick. 128, § 419.
 v. Wilson, 22 Ill. 377, § 267.
 Real v. People, 42 N. Y. 270, § 262.
 Rector v. Hudson, 29 Tex. 236, § 155.
 Rede v. Swift, 45 Cal. 255, § 325.
 Redman v. Gulnac, 5 Cal. 148, § 348.
 Reed v. Boardman, 20 Pick. 441, § 229.
 v. Clark, 47 Cal. 194, § 247.
 v. Jewett, 5 Me. 96, § 267.
 Rees v. Smith, 2 Starkie, 31, § 213.
 Reese v. Stillé, 38 Penn. St. 138, § 449.
 Reeves v. Moody, 15 Rich. 312, § 409.
 v. Templar, 2 Jur. 137, § 384.
 Regina v. Beard, 8 C. & P. 142, § 210.
 v. Brownlow, 11 Ad. & El. 119, § 64.
 v. Butcher, 2 M. & Rob. 228, § 210.

- Regina v. Charlesworth*, 101 Eng. L. & Eq. 460, § 480.
v. Davidson, 2 F. & F. 251, § 480.
v. Fisher, 8 C. & P. 182, § 287.
v. Frost, 9 C. & P. 129, § 165.
v. Geach, 9 C. & P. 499, § 177.
v. Hughes, 1 C. & K. 235, §§ 149, 153.
v. Lacey, 3 Cox C. C. 517, § 153.
v. Maloney, 9 Cox Cr. C. 6, § 331.
v. McIntosh, 32 L. T. Q. B. 146, § 68.
v. Meany, 1 Leigh & C. 213, § 458.
v. Stockdale, 8 Dowl. P. C. 517, § 65.
v. Taylor, 9 C. & P. 672, § 67.
v. Vodden, 22 Eng. L. & Eq. 596, § 452.
- Reid v. Mason*, 12 Iowa, 541, § 337.
v. State, 20 Geo. 681, § 162.
- Reins v. People*, 30 Ill. 256, §§ 391, 451.
- Relf v. Rapp*, 3 Watts & S. 21, § 319.
- Reno v. Wilson*, 49 Ill. 95, § 271.
- Respublica v. Shaffer*, 1 Dall. 136, § 53.
- Rex v. Beezley*, 4 C. & P. 220, § 55.
v. Bennett, 6 C. & P. 179, § 65.
v. Bond, 1 Stra. 22, § 64.
v. Bowen, 3 C. & P. 602, § 65.
v. Brandreth, 32 How. St. Tr. 774, § 194.
v. Burdett, 4 B. & A. 131, § 384.
v. Burdett, 2 Salk. 645, § 398.
v. Dalton, 2 Stra. 911, § 68.
v. Davis, 7 C. & P. 785, § 210.
v. Dolby, 2 B. & C. 104, § 73.
v. Edmonds, 4 B. & Al. 477, §§ 71, 149, 153, 167.
v. Edwards, 4 T. R. 440, § 242.
v. Evett, 6 B. & C. 267, § 64.
v. Farrand, 1 Chitt. 745, § 64.
v. Fisher, 2 Camp. 563, § 67.
v. Fleet, 1 B. & Ald. 379, § 67.
v. Friend, 13 How. St. Tr. 16-18, § 244.
v. Gascoigne, 7 C. & P. 772, § 210.
v. Hardy, 24 How. St. Tr. 659, § 239.
v. Hartel, 7 C. & P. 773, § 210.
v. Harvey, 2 B. & C. 257, § 270.
v. Hastings, 7 C. & P. 152, § 365.
v. Hayes, 2 M. & Rob. 155, § 221.
v. Hensey, 1 Burr. 647, § 76.
v. Holloway, 9 C. & P. 43, § 61.
v. Hucks, 1 Starkie, 523, § 309.
v. Hughes, 1 Harr. & W. 313, § 458.
v. Ingham, 5 B. & S. 257, § 64.
v. Jordan, 9 C. & P. 118, § 221.
v. Justices of Kent, 11 East, 229, § 65.
- Rex v. Knowles*, 1 Salk. 47, § 60.
v. Ladsingham, 1 Vent. 97, §§ 412, 449.
v. Ledrington, 1 Vent. 26, § 77.
v. Lord Abingdon, 1 Esp. 228, § 270.
v. Marsh, 6 Ad. & El. 236, § 49.
v. Marsh, 6 Ad. & El. 242, § 45.
v. Norfolk, 1 East P. C. 383, § 65.
v. Parker, 3 Keb. 489, § 68.
v. Percival, 1 Sid. 243, § 189.
v. Perry, 5 T. R. 453, § 73.
v. Plummer, 3 C. & P. 49, § 65.
v. Plummer, 12 Mod. 628, § 436.
v. Poole, Cas. temp. Hard. 28, § 256.
v. Quinch, 4 C. & P. 571, § 64.
v. Rogers, 2 Campb. 654, § 216.
v. Russell, 1 C. & M. 247, § 53.
v. Savage, R. & M. C. C. 61, § 153.
v. Scorey, 1 Leach C. C. 43, §§ 64, 67.
v. Simons, Sayer, 36, § 444.
v. Slaney, 5 C. & P. 213, § 244.
v. Sutton, 8 B. & C. 417, §§ 153, 172.
v. Taggart, 1 C. & P. 201, § 433.
v. Turner, 5 M. & Sel. 206, § 217.
v. Vincent, 9 C. & P. 91, § 55.
v. Walls, 2 C. & K. 214, § 428.
v. Watson, 2 Stark. 149, § 241a.
v. Woburn, 10 East, 395, § 244.
v. Woodfall, 5 Burr. 2667, §§ 408, 440.
v. Wright, R. & R. 456, § 228.
- Reynolds v. Cox*, 11 Ind. 262, § 368.
v. Dechaums, 24 Tex. 177, § 269.
v. People, 41 How. Pr. 179, §§ 328, 353.
v. Richards, 14 Penn. St. 205, § 301.
v. Transp. Co. 9 How. Pr. 7, § 410.
v. West, 1 Cal. 322, § 305.
- Rhines v. Baird*, 41 Penn. St. 256, § 284.
- Rice v. People*, 38 Ill. 435, § 314.
v. State, 7 Ind. 332, § 185.
v. State, 16 Ind. 298, § 189.
- Rich v. Eldredge*, 42 N. H. 153, § 308.
- Richards v. Sperry*, 7 Wis. 219, § 444.
- Richardson v. Eastman*, 12 Mass. 505, § 409.
- Richardson v. Jones*, 1 Nev. 405, § 403.
- Richmond v. Sacramento R. R. Co.* 18 Cal. 351, § 298.
- Richmond, &c. Co. v. Farquar*, 8 Blackf. 99, § 300.
- Ridgeway v. Dearing*, 42 Ind. 157, § 439.
v. Roberts, 4 Hare, 106, 119, § 94.

- Rigby v. Norwood, 34 Ala. 129, § 352.
 Rigg v. Cook, 4 Gilm. 336, § 449.
 Riggins v. Brown, 12 Geo. 271, § 405.
 Riles v. Holmes, 11 Ired. 16, § 296.
 Riley v. Dickens, 19 Ill. 29, § 300.
 v. State, 6 Humph. 275, § 388.
 v. State, 9 Humph. 646, § 270.
 Ringold v. Jones, 1 Bland, 89, § 92.
 Ripley v. Coolidge, Minor, 11, § 194.
 v. Ins. Co. 30 N. Y. 136, § 281.
 Ritchey v. Davis, 11 Iowa, 124, § 270.
 Ritter v. Ins. Co. 40 Mo. 40, § 282.
 Rivers v. Thompson, 43 Ala. 633, § 289.
 Robinson, Ex parte, 3 Ind. 52, § 103.
 Robinson v. Adkins, 19 Geo. 398, § 253.
 Robbins v. Dillaye, 33 Barb. 77, § 293.
 v. Wendover, 2 Tyl. 11, § 408.
 Roberts v. State, 42 Ala. 509, § 427.
 Robertson v. State, 14 Geo. 8, § 425.
 v. Dodge, 28 Ill. 161, § 362.
 Robinson v. Green, 5 Harring. 115, § 274.
 v. Parnell, 16 Tex. 382, § 343.
 v. White, 42 Mo. 209, § 305.
 Rodman v. Gaylord, 7 Jones L. 262, § 305.
 Rogers v. Brightman, 10 Wis. 64, § 340.
 v. Carey, 47 Mo. 235, § 300.
 v. Lamb, 3 Blackf. 155, § 189.
 v. McCune, 19 Mo. 557, § 326.
 v. Rogers, 3 Wend. 15, § 90.
 v. Rogers, 14 Wend. 131, § 185.
 Rollings v. Cate, 1 Heisk. 97, § 346.
 Root v. King, 7 Cow. 613, § 270.
 v. Sherwood, 6 Johns. 68, §§ 449, 456.
 Ropps v. Parker, 4 Pick. 238, § 465.
 Rose v. State, 33 Ind. 167, § 427.
 v. St. Charles, 49 Mo. 509, § 474.
 Rosenbaum v. State, 33 Ala. 354, § 245.
 v. Weeden, 18 Gratt. 785, § 339.
 Rosenheim v. Ins. Co. 33 Mo. 235, § 283.
 Rosenweig v. People, 6 Lans. 462, § 245.
 Ross v. Eason, 1 Yeates, 14, § 474.
 v. Irving, 14 Ill. 171, § 87.
 v. State, 1 Blackf. 390, § 47.
 Rosser v. McCally, 9 Ind. 587, § 247.
 Rosse's case, 2 Leon. 94, § 444.
 Roth v. Buffalo, &c. R. R. Co. 34 N. Y. 548, § 287.
 v. Calvin, 32 Vt. 125, § 284.
 v. Smith, 41 Ill. 314, § 472.
 Rowe v. Collier, 25 Tex. 252, § 471.
 v. Smith, 11 Humph. 491, § 402.
 Rowles v. State, 5 Sneed, 360, § 113.
 Rowley v. Ins. Co. 36 N. Y. 550, § 276.
 Ruble v. McDonald, 7 Iowa, 90, § 406.
 Ruloff v. People, 45 N. Y. 213, § 336.
 Rusch v. City, 6 Iowa, 443, § 337.
 Russ v. Steamboat, 9 Iowa, 375, § 325.
 Russell v. Dyer, 40 N. H. 173, § 301.
 v. Hamilton, 2 Scam. 56, § 169.
 v. Neal, 7 Monr. 407, § 76.
 v. State, 10 Tex. 288, § 202.
 v. Wheeler, 1 Hemp. 3, §§ 414, 463.
 Ryan v. Harrow, 27 Iowa, 494, § 403.
 v. Jackson, 11 Tex. 391, § 344.
 Ryder v. Womball, 17 L. T. R. (N. S.) 609, § 299.
- S.
- Saco v. Wentworth, 37 Me. 165, § 102.
 Safford v. People, 1 Park. Cr. 474, § 378.
 Salter v. Glenn, 42 Geo. 64, § 323.
 Sam v. State, 13 Sm. & M. 189, § 181.
 v. State, 1 Swan, 61, § 392.
 Samuels v. State, 3 Mo. 68, §§ 131, 132.
 Sanchez v. People, 4 Park. Cr. 535, § 187.
 v. People, 22 N. Y. 147, § 193.
 Sanders v. Etcherson, 36 Geo. 404, § 468.
 Sandford v. State, 6 Eng. 328, § 200.
 Sands v. Kimbark, 27 N. Y. 147, § 93.
 v. Robinson, 12 S. & M. 704, § 49.
 Sargent v. State, 11 Ohio, 472, § 465.
 Sartor v. McJunkin, 8 Rich. 451, § 452.
 Sattler v. People, 59 Ill. 68, § 59.
 Saunders v. Baxter, 6 Heisk. 369, § 250.
 Savignac v. Garrison, 18 How. 136, § 301.
 Saville v. Lord Farnham, 17 Eng. C. L. 301, § 352.
 Sawyer v. Nicholls, 40 Me. 212, § 320.
 v. Nicholls, 40 Me. 216, § 368.
 v. Sauer, 10 Kans. 470, § 311.
 Sayre v. Jewett, 12 Wend. 135, § 464.
 Scheetz's Appeal, 35 Penn. St. 88, § 91.
 Schenck v. Ins. Co. 4 Zab. 447, § 281.
 Schilling v. Durst, 42 Penn. St. 126, § 292.
 Schmidt v. Ins. Co. 1 Gray, 535, § 369.
 Schmitz v. Lauferty, 29 Ind. 400, § 444.
 Schneur v. People, 23 Ill. 17, § 380.
 Schoeffler v. State, 3 Wis. 823, §§ 164, 167, 183, 193.
 Schoffer v. State, 27 Ind. 131, § 486.
 Schofield v. Ferrers, 47 Penn. St. 196, § 270.
 Schoonover v. State, 17 Ohio St. 294, § 424.
 Schram v. People, 29 Ill. 162, § 433.
 Schroeder v. Ins. Co. 46 Mo. 174, § 281.
 Schultz v. Lindell, 40 Mo. 330, § 305.
 v. Pacific Ins. Co. 14 Fla. 73, § 471.
 Schumaker v. State, 5 Wis. 324, § 171.

- Schuylkill Nav. Co. v. Farr, 4 W. & S. 362, § 163.
 Scott v. Brockway, 7 Mo. 61, § 472.
 v. Galbraith, 1 Dail. 134, § 464.
 v. Home Ins. Co. 1 Dill. C. C. 105, § 335.
 v. State, 31 Miss. 473, § 423.
 Scruggs v. Brackin, 4 Yerg. 528, § 107.
 Seavy v. Dearborn, 19 N. H. 351, § 229.
 Secrest v. Jones, 30 Tex. 596, § 415.
 Seigel v. Eisen, 41 Cal. 109, § 295.
 Sellers v. Johnson, 65 N. C. 104, § 302.
 Seller v. Pacific, 1 Oregon, 409, § 285.
 Sellers v. Jones, 22 Penn. St. 420, § 292.
 Senter v. Carr, 15 N. H. 351, § 364.
 Sessions v. Newport, 23 Vt. 9, § 264.
 Settle v. Alison, 8 Geo. 201, § 461.
 Seymour v. McCormick, 19 How. 96, § 287.
 Shaffer v. State, 1 How. 238, §§ 132, 133.
 Shaffer's case, 1 How. 238, § 138.
 Shamokin R. R. Co. v. Livermore, 47 Penn. St. 465, § 300.
 Shank v. Fleming, 9 Ind. 189, § 214.
 v. State, 25 Ind. 207, § 324.
 Shanks v. Hays, 6 Ind. 59, § 473.
 Shannon v. Commonwealth, 8 Serg. & R. 444, § 170.
 Shapleigh v. Abbott, 41 Me. 173, § 444.
 Sharp v. Burns, 35 Ala. 654, § 339.
 v. Wickliffe, 3 Litt. 10, § 473.
 Sharpe v. State, 48 Geo. 16, § 315.
 Shattuck v. State, 11 Ind. 473, § 57.
 Shaw v. Kent, 11 Ind. 80, § 111.
 v. Newman, 14 Fla. 128, § 74.
 v. Wood, 8 Ind. 518, § 142.
 Shearer v. State, 7 Blackf. 99, § 217.
 Shehan v. Barry, 27 Mich. 217, § 439.
 Sheldon v. Clark, 1 Johns. 513, § 217.
 v. Ins. Co. 25 Conn. 207, § 278.
 Shell v. Sanders, 46 Geo. 469, § 415.
 Shepherd v. Baylor, 2 South. 827, § 397.
 v. Ins. Co. 38 N. H. 232, § 281.
 v. White, 11 Tex. 346, § 300.
 Sheppard v. Steele, 43 N. Y. 52, § 93.
 Sheriff of Bucks' case, 2 Vent. 58, § 150.
 Sherman v. Dutch, 16 Ill. 283, § 315.
 v. Western Co. 62 Barb. 150, § 271.
 Sherwood v. Marwick, 5 Me. 295, § 266.
 Short v. West, 30 Ind. 367, § 396.
 v. Woodward, 13 Gray, 86, § 302.
 Shouse v. Commonwealth, 5 Penn. St. 73, § 434.
 Shropshire v. State, 12 Ark. 190, § 44.
 Shute v. Robbins, M. & M. 133, § 264.
 Siebert v. Spooner, 1 M. & W. 714, § 266.
 Sill v. Recse, 47 Cal. 294, § 228.
 Sills v. Brown, 9 C. & P. 601, § 228.
 Silverthorne v. Fowle, 4 Jones L. 362, § 300.
 Simpson v. Buck, 5 Lana. 335, § 471.
 Sims v. State, 43 Ala. 33, § 323.
 Sinclair v. Jackson, 47 Me. 102, §§ 312, 335.
 Singleton v. Ake, 3 Humph. 626, § 447.
 v. R. R. Co. 41 Mo. 464, § 352.
 Sisson v. Barrett, 2 N. Y. 406, § 438.
 v. Conger, 1 Thomp. & C. 564, § 231.
 Sites v. Haverstock, 23 Ohio N. S. 626, § 418.
 Skillen v. Jones, 44 Ind. 136, § 439.
 Slate v. Populus, 12 La. An. 710, § 451.
 Slatterly v. People, 58 N. Y. 351, § 315.
 Slaughter v. People, 2 Dong. 334, § 97.
 v. State, 5 Humph. 410, § 425.
 Sleight v. Hartshorne, 1 Johns. 149, § 464.
 v. Henning, 12 Mich. 371, § 464.
 Small v. Smith, 1 Denio, 583, § 292.
 Smalley v. Hendrickson, 5 Dutch. 373, § 302.
 Smart v. Rayner, 6 C. & P. 721, § 213.
 Smiley v. Allen, 6 Pick. 70, § 65.
 Smith, Ex parte, 28 Ind. 47, § 103.
 Smith v. Acker, 23 Wend. 653, § 266.
 v. Cleveland, 6 Met. 332, § 418.
 v. Commonwealth, 7 Gratt. 593, § 187.
 v. Crichton, 33 Md. 103, § 349.
 v. Curtis, 5 Allen, 367, § 342.
 v. Floyd, 18 Barb. 522, § 192.
 v. Foaves, Noy, 147, § 438.
 v. Jeffries, 9 Price, 257, § 217.
 v. Jones, 13 Ired. 442, § 300.
 v. Martin, 4 Desaus. 149, § 92.
 v. R. R. Co. 19 N. Y. 130, § 298.
 v. Raymond, 1 Day, 189, § 444.
 v. Richards, 16 Me. 200, § 471.
 v. San Antonio, 17 Tex. 643, § 97.
 v. Sasser, 5 Jones, 388, § 315.
 v. Seaton, Minor, 75, § 107.
 v. Smith, 2 Pick. 621, § 357.
 v. Tiffany, 36 Barb. 23, 471.
 v. Waggenseller, 21 Penn. St. 491, § 189.
 v. Williams, 22 Ill. 257, § 473.
 Smull v. Jones, 6 Watts & S. 122, § 170.
 Sneed v. Ewing, 5 J. J. Marsh. 460, § 90.
 Snell v. Nav. Co. 30 Me. 337, § 461.
 Snively v. Fahnestock, 18 Md. 391, § 340.
 Snodgrass v. Hunt, 15 Ind. 274, § 163.
 Snow v. R. R. Co. 8 Allen, 441, § 298.
 Snyder v. Snyder, 6 Binn. 483, § 226.
 Soudousky v. McGee, 4 J. J. Marsh. 267, § 163.

- Sofret v. Hartman*, 5 Jones L. 185, § 305.
Sorrell v. Craig, 9 Ala. 534, § 455.
Southard v. Rexford, 6 Cow. 254, § 244.
South. Ex. Co. v. Newby, 36 Geo. 635, §§ 285, 314.
 v. Purcell, 37 Geo. 103, § 285.
Spadore v. Manvel, 2 Daly, 263, § 275.
Sparks v. Commonwealth, 3 Bush, 117, § 333.
Sparrow v. Turner, 2 Wils. 366, § 73.
Spaulding v. Robbins, 42 Vt. 90, § 439.
Spear v. Richardson, 37 N. H. 23, § 226.
 v. Spencer, 1 Iowa, 534, § 189.
Spencer v. De France, 3 Iowa, 216, § 165.
 v. Milwaukee, &c. R. R. Co.
 17 Wis. 503, § 294.
 v. Sampson, 1 Caines, 498, § 72.
Spies v. Boyd, 1 E. D. Smith, 445, § 306.
Spivey v. State, 8 Ind. 405, § 356.
Sprague v. Craig, 51 Ill. 288, § 251.
Springer v. State, 34 Geo. 379, § 177.
Sprouce v. Commonwealth, 2 Virg. Cas. 375, § 167.
Stafford v. Ballou, 17 Vt. 329, § 284.
 v. Green, 1 Johns. 505, § 464.
Stake v. Burrill, 3 Grant, 241, § 302.
Stalls v. State, 28 Ala. 25, § 178.
Stanley v. Bank, 23 Ala. 650, § 284.
Stansbury v. Nichols, 30 Tex. 145, § 420.
Startup v. Macdonald, 2 M. & G. 395, § 286.
State v. Adams, 20 Iowa, 486, § 119.
 v. Alderson, 10 Yerg. 523, § 132.
 v. Allen, 1 Ala. 442, § 56.
 v. Allen, 3 Jones L. 257, § 323.
 v. Allen, 1 McCord, 525, § 465.
 v. Anderson, 5 Harr. 493, §§ 185, 189.
 v. Anderson, 4 Nev. 265, § 165.
 v. Arnold, 12 Iowa, 479, § 196.
 v. Arthur, 2 Dev. 217, § 160.
 v. Arthur, 23 Iowa, 430, § 314.
 v. Arthur, 39 Iowa, 631, § 130.
 v. Ayer, 3 Fost. 301, § 410.
 v. Babcock, 1 Conn. 401, 398.
 v. Baker, 4 Humph. 12, § 55.
 v. Baker, 8 Md. 44, § 323.
 v. Baker, 69 N. C. 147, § 319.
 v. Baldwin, Const. Rep. (S. C.), 289, § 196.
 v. Baldy, 17 Iowa, 39, § 403.
 v. Bartlett, 43 N. H. 224, § 211.
 v. Bean, 21 Mo. 269, § 423.
 v. Beneke, 9 Iowa, 203, § 101.
 v. Bennett, 14 La. An. 651, § 196.
 v. Benton, 2 Dev. & Bat. 196, § 183.
State v. Bodly, 7 Blackf. 355, § 134.
 v. Bone, 7 Jones, 121, §§ 160, 194.
 v. Boyd, 2 Hill (S. C.), 288, § 53.
 v. Branch, 68 N. C. 186, § 55.
 v. Brannon, 45 Mo. 329, § 395.
 v. Brantley, 63 N. C. 518, § 339.
 v. Bray, 67 N. C. 283, § 454.
 v. Brennan's Liquors, 25 Conn. 278, §§ 98, 101.
 v. Bright, 2 Car. L. Rep. 634, § 442.
 v. Brooks, 9 Ala. 9, § 154.
 v. Brooks, 1 Hill, 361, § 434.
 v. Brunschweig, 36 Mo. 397, § 454.
 v. Bryant, West. Jur. 709, § 187.
 v. Buchanan, 5 Harr. & J. 317, § 467.
 v. Bullard, 16 N. H. 39, § 401.
 v. Bunker, 14 La. An. 461, §§ 144, 185, 194.
 v. Burke, 38 Me. 574, § 423.
 v. Butman, 42 N. H. 490, § 428.
 v. Byrne, 26 Mo. 151, § 328.
 v. Cain, 1 Hawks, 352, § 55.
 v. Calhoon, 1 Dev. & B. 374, § 58.
 v. Cameron, 2 Chand. (Wis.) 172, § 47, 150, 165.
 v. Camp, 23 Vt. 551, § 395.
 v. Canterbury, 40 N. H. 315, § 298.
 v. Carnahan, 17 Iowa, 256, § 319.
 v. Caulfield, 23 La. An. 146, § 402.
 v. Chandler, 2 Hawks, 429, § 58.
 v. Clarkson, 3 Ala. 378, § 45.
 v. Clayton, 11 Rich. 581, § 133.
 v. Cocker, 3 Harr. 554, § 426.
 v. Cohn, 9 Nev. 179, § 120.
 v. Cole, 9 Humph. 626, §§ 130, 133.
 v. Coleman, 5 Ala. 32, § 428.
 v. Collins, 3 Dev. 117, § 58.
 v. Collins, 20 Iowa, 85, §§ 337, 340.
 v. Collins, 70 N. C. 241, §§ 187, 254.
 v. Cooper, 45 Mo. 64, § 349.
 v. Cowan, 1 Head, 280, §§ 53, 56.
 v. Cowell, 4 Ired. 231, § 426.
 v. Cox, 3 Eng. 436, §§ 97, 110.
 v. Cox, 6 Ired. 44, § 58.
 v. Crank, 2 Bailey, 66, § 196.
 v. Craton, 6 Ired. 164, § 160.
 v. Crawford, 11 Kan. 32, § 184.
 v. Creight, 1 Brev. 169, § 60.
 v. Creighton, 1 Nort & McCord. 257, § 58.
 v. Crouteau, 23 Vt. 14, § 377.
 v. Da Rocha, 20 La. An. 356, § 130.
 v. Daubert, 42 Mo. 242, § 353.

- State v. Davidson*, 67 N. C. 119, § 442.
v. Davidson, 12 Vt. 300, § 58.
v. Dayton, 3 Zab. 49, § 56.
v. Delong, 12 Iowa, 453, § 306.
v. Denton, 6 Coldw. 539, § 80.
v. Dick, 1 Wins. (N. C.) 45, § 310.
v. Dillihunt, 18 Mo. 331, § 316.
v. Doty, 3 Vroom, 403, § 103.
v. Dover, 9 N. H. 468, § 43.
v. Downer, 21 Wis. 275, § 325.
v. Dumphy, 4 Minn. 438, § 176.
v. Duncan, 2 McCord, 129, § 441.
v. Dunlop, 65 N. C. 288, § 313.
v. Dunn, 18 Mo. 419, § 287.
v. Durbin, 20 La. An. 408, § 60.
v. Earle, 24 La. An. 38, § 164.
v. Egan, 10 La. An. 698, § 434.
v. Elkins, Meigs, 109, § 58.
v. Ellington, 7 Ired. 544, § 184.
v. Elliott, 68 N. C. 124, § 245.
v. Engle, 13 Ohio, 490, § 455.
v. Ephraim, 2 Dev. & Bat. 162, § 484.
v. Everett, 14 Minn. 439, §§ 76, 101.
v. Faller, 34 Conn. 280, § 423.
v. Fassett, 16 Conn. 464, §§ 49, 55.
v. Fidment, 35 Iowa, 541, § 310.
v. Flugate, 27 Mo. 535, § 332.
v. Ford, 21 Wis. 610, § 332.
v. Forshner, 43 N. H. 89, § 119.
v. Fox, 1 Dutch. 566, §§ 185, 196.
v. Frank, 5 Jones L. 384, § 333.
v. Gaffney, Rice, 431, § 429.
v. Gallagher, 26 La. An. 46, § 143.
v. Galloway, 5 Coldw. 326, § 103.
v. Gay, 10 Mo. 441, § 433.
v. Gibbs, 39 Iowa, 319, § 49.
v. Gillick, 7 Clarke, 287, §§ 130, 183.
v. Gillick, 10 Iowa, 98, § 181.
v. Godfrey, Brayt. 170, § 183.
v. Grand Rapids, &c. R. R. Co. 18 Mich. 459, § 130.
v. Gregory, 5 Jones L. 315, § 336.
v. Grisham, 1 Hayw. 12, § 426.
v. Gurney, 37 Me. 156, § 102.
v. Gut, 13 Minn. 31, §§ 126, 129.
v. Hamilton, 55 Mo. 520, § 249.
v. Hardin, 1 Bailey, 3, § 465.
v. Harrison, 5 Jones, 115, § 315.
v. Haschall, 6 N. H. 352, § 390.
v. Hawkins, 5 Eng. 71, § 45.
v. Harkin, 7 Nev. 377, § 323.
v. Herndon, 5 Blackf. 75, § 44.
v. Hill, 30 Wis. 416, § 425.
v. Howard, 10 Iowa, 101, §§ 47, 139.
v. Howard, 17 N. H. 121, § 167.
v. Howard, 17 N. H. 171, § 183.
- State v. Huber*, 8 Kan. 447, § 380.
v. Humphreys, 1 Overton, 806, § 158.
v. Ingalls, 17 Iowa, 8, § 44.
v. Izard, 14 Rich. 209, § 427.
v. Jewell, 33 Me. 583, §§ 178, 183.
v. Joeckel, 44 Mo. 234, § 328.
v. Johnson, Cox, 219, § 134.
v. Jones, 33 Iowa, 9, § 316.
v. Jones, 7 Nev. 408, § 403.
v. Jones, 69 N. C. 364, § 424.
v. Jurche, 17 La. An. 71, §§ 381, 422.
v. Kattleman, 35 Mo. 105, § 425.
v. Keyes, 8 Vt. 57, § 51.
v. Kirkland, 14 Rich. 230, § 328.
v. Knight, 19 Iowa, 94, § 46.
v. Knight, 43 Me. 11, §§ 270, 340.
v. Knight, 46 Mo. 83, § 413.
v. Lamon, 3 Hawks, 175, §§ 44, 142.
v. Lamont, 2 Wis. 437, § 473.
v. Lassiter, 70 N. C. 462, § 252.
v. Laseley, 7 Port. 526, § 50.
v. Lawrence, 38 Iowa, 51, § 187.
v. Lawry, 4 Nev. 161, § 46.
v. Lehre, 2 Brev. 446, § 385.
v. Ligon, 7 Port. 167, § 44.
v. Litchfield, 58 Me. 267, § 365.
v. Lizemore, 7 Jones L. 206, § 287.
v. Lohmdn, 3 Hill, 67, § 448.
v. Long, 7 Jones, 24, § 423.
v. Maine, 27 Conn. 641, § 377.
v. Maine, 31 Conn. 575, § 97.
v. Malling, 11 Iowa, 239, § 425.
v. Mansfield, 41 Mo. 470, § 113.
v. Marshall, 8 Ala. 302, § 140.
v. Marshall, 36 Mo. 400, § 130.
v. Martin, 2 Ired. 101, § 44.
v. Martin, 70 N. C. 628, § 353.
v. Mason, Const. Rep. 200, § 446.
v. Massey, 2 Hill (S. C.), 379, § 125.
v. Mathis, 3 Ark. 84, § 56.
v. Matrassy, 47 Mo. 295, § 486.
v. Mayberry, 48 Me. 218, § 486.
v. McCarron, 51 Mo. 27, § 165.
v. McCartney, 17 Minn. 76, § 247.
v. McCluer, 5 Nev. 132, § 333.
v. McCombs, 13 Iowa, 426, § 424.
v. McCory, 2 Blackf. 5, § 95.
v. McDonnell, 32 Vt. 491, § 344.
v. McDonnell, 32 Vt. 523, § 377.
v. McElmurray, 3 Strobb. 33, §§ 132, 133.
v. McKee, 1 Bailey, 651, § 487.
v. McNamara, 3 Nev. 70, § 130.
v. McQuaige, 5 Rich. 449, § 153.
v. Medlicott, 9 Kans. 257, § 185.
v. Message, 65 N. C. 480, § 337.
v. Middleton, 5 Porter, 484, § 44.
v. Millain, 3 Nev. 409, § 130.

State v. Miller, 3 Ala. 343, § 46.
 -- Miller, 2 Blackf. 35, § 118.
 v. Miller, 1 Dev. & Bat. 500, § 395.
 v. Miller, 10 Minn. 313, § 472.
 v. Miller, 15 Minn. 344, § 80.
 v. Millican, 15 La. An. 557, § 211.
 v. Mills, 19 Ark. 476, § 453.
 v. Mitchell, 1 Bay, 269, § 56.
 v. Monaquo, Charit. 16, § 164.
 v. Monk, 3 Ala. 415, § 134.
 v. Montague, 2 McCord, 257, § 426.
 v. Montgomery, 28 Mo. 594, § 423.
 v. Morea, 2 Ala. 275, §§ 183, 194.
 v. Martens, 14 Miss. 94, § 58.
 v. Motley, 7 Rich. 327, § 44.
 v. Murat, 4 Halst. 3, § 72.
 v. Murphy, 33 Iowa, 270, § 314.
 v. Murphy, 9 Port. 487, § 54.
 v. Nash, 8 Ired. 35, § 144.
 v. Noble, 20 La. An. 325, § 95.
 v. Norton, 45 Vt. 258, § 55.
 v. O'Brien, 22 La. An. 27, § 432.
 v. One Bottle of Brandy, 43 Vt. 297, § 98.
 v. Ostrander, 18 Iowa, 435, §§ 47, 139.
 v. Ott, 49 Mo. 326, § 338.
 v. Pace, 9 Rich. 355, § 418.
 v. Page, 21 Mo. 257, § 254.
 v. Parker, 66 N. C. 624, § 323.
 v. Patrick, 3 Jones, 443, § 194.
 v. Patterson, 2 Ired. 346, § 241a.
 v. Patterson, 45 Vt. 308, § 348.
 v. Pearce, 2 Jones (N. C.), 251, § 381.
 v. Perry, Busbee, 330, § 174.
 v. Peterson, 2 La. An. 921, § 428.
 v. Peterson, 41 Vt. 504, § 97.
 v. Phinney, 42 Me. 391, § 340.
 v. Pike, 49 N. H. 399, 228.
 v. Potter, 18 Conn. 166, § 187.
 v. Potter, 42 Vt. 495, § 365.
 v. Powell, 2 Halst. 244, § 130.
 v. Prescott, 6 N. H. 287, § 394.
 v. Quimby, 51 Me. 395, § 119.
 v. Reed, 47 N. H. 466, § 164.
 v. Reid, 20 Iowa, 413, § 145.
 v. Roberts, 2 N. C. 542, § 55.
 v. Robinson, 14 Minn. 447, § 80.
 v. Rollins, 2 Fost. 528, § 202.
 v. Rose, 32 Miss. 406, § 185.
 v. Salika, 18 La. An. 35, § 381.
 v. Scannel, 39 Me. 68, § 428.
 v. Scripture, 42 N. H. 485, § 423.
 v. Seaborn, 4 Dev. 305, § 44.
 v. Shaw, 3 Ired. 532, § 174.
 v. Shelleday, 8 Iowa, 477, § 423.
 v. Sheeley, 15 Iowa, 404, § 189.
 v. Shepard, 10 Iowa, 109, § 454.

State v. Shettleworth, 18 Minn. 209, § 332.
 v. Shule, 10 Ired. 153, § 458.
 v. Simmons, 6 Jones, 309, § 130.
 v. Sims, 2 Bailey, 29, § 196.
 v. Sloan, 47 Mo. 604, § 328.
 v. Smith, 8 Blackf. 489, § 96.
 v. Smith, 2 Ired. 402, § 165.
 v. Smith, 6 R. I. 34, §§ 306a, 404.
 v. Snow, 18 Me. 346, § 377.
 v. Sparrow, 3 Murph. 487, § 402.
 v. Spencer, 1 N. J. 196, § 184.
 v. Spencer, 64 N. C. 316, § 364.
 v. Sprinkle, 65 N. C. 463, § 54.
 v. Squire, 2 N. H. 558, § 56.
 v. Squire, 10 N. H. 558, § 60.
 v. Squires, 2 Nev. 226, § 118.
 v. Stalmaker, 2 Brev. 1, § 160.
 v. Starr, 38 Mo. 270, § 328.
 v. Stedman, 7 Port. 495, §§ 58, 133, 429.
 v. Symonds, 36 Me. 128, §§ 45, 46.
 v. Taggart, 38 Me. 298, § 58.
 v. Tindall, 10 Rich. 212, § 405.
 v. Thompson, 9 Iowa, 188, §§ 181, 187.
 v. Thompson, 19 Iowa, 299, § 317.
 v. Turner, 19 Iowa, 144, § 344.
 v. Turner, 25 La. An. 573, § 397.
 v. Underwood, 2 Ala. 744, § 458.
 v. Upchurch, 9 Ired. 454, § 428.
 v. Upton, 20 Mo. 397, § 403.
 v. Vogel, 22 Wis. 471, §§ 116, 172.
 v. Wallace, 3 Ired. 195, § 436.
 v. Walters, 15 La. An. 648, § 452.
 v. Waltham, 48 Mo. 55, § 249.
 v. Ward, 2 Hawks, 443, § 130.
 v. Ward, 14 La. An. 651, §§ 184, 196.
 v. Ward, 39 Vt. 225, § 178.
 v. Waterhouse, Mart. & Yerg. 278, § 490.
 v. Waterman, 1 Nev. 453, § 456.
 v. Watson, 63 Me. 128, § 209.
 v. Webster, 13 N. H. 491, § 189.
 v. Welch, 33 Mo. 33, § 47.
 v. Whitman, 14 Rich. 113, § 139.
 v. Wilhite, 11 Humph. 602, §§ 53, 56.
 v. William, 3 Stew. 454, § 132.
 v. Williams, 1 Dev. & B. 372, § 120.
 v. Williams, 2 Jones (N. C.), 257, § 364.
 v. Williams, 30 Me. 484, § 169.
 v. Williams, 2 McCord, 301, § 60.
 v. Williams, 65 N. C. 505, § 252.
 v. Williams, 5 Port. 130, § 132.
 v. Williams, 1 Rich. 188, § 46.
 v. Williams, 3 Stew. 454, § 187.
 v. Wilson, 8 Clarke, 407, §§ 169, 340.

- State v. Wise*, 7 Richards, 412, §§ 165, 465.
 v. Wolcott, 21 Conn. 272, § 51.
 v. Wood, 53 N. H. 484, § 49.
 v. Wright, 53 Me. 328, §§ 119, 144, 377.
 v. Zeigler, 3 Vroom, 262, § 100.
Staup v. Commonwealth, 74 Penn. St. 456, § 168.
Stebbins v. Miller, 12 Allen, 591, § 316.
Steele v. Commonwealth, 3 Dana, 84, § 165.
Steinmetz v. Wingate, 42 Ind. 574, § 352.
Stephens v. Brooks, 2 Bush (Ky.), 137, § 355.
 v. Hussa, 54 Penn. St. 20, § 291.
 v. People, 19 N. Y. 550, § 394.
Stephenson v. Belknap, 6 Iowa, 97, § 343.
Stevens v. Beach, 12 Vt. 585, § 245.
 v. Fassett, 27 Me. 266, 271.
 v. Thornton, 26 Ill. 823, § 292.
Stevenson v. Stiles, 2 Penn. 740, § 174.
Steward v. Thomas, 35 Mo. 202, § 268.
Stewart v. Inglehart, 7 Gill & J. 132, § 92.
 v. Johnson, Coxe, 27, § 274.
 v. Mayor, 7 Md. 500, § 101.
 v. R. R. Co. 11 Iowa, 62, §§ 404, 410.
 v. Small, 5 Mo. 525, § 390.
 v. State, 8 Eng. 720, § 165.
 v. State, 24 Ind. 142, § 53.
 v. State, 5 Ohio, 242, § 429.
 v. State, 15 Ohio St. 155, §§ 189, 488.
Stilson v. Tobey, 2 Mass. 520, § 420.
Stillwell v. Kellogg, 14 Wis. 461, §§ 87, 91, 93.
St. John's Parish v. Bronson, 40 Conn. 75, § 299.
St. Louis R. R. Co. v. Manly, 58 Ill. 300, § 323.
St. Martin v. Deanoyer, 1 Minn. 156, § 406.
Stodden v. Harvey, Cro. J. 204, § 287.
Stoffer v. State, 15 Ohio St. 47, § 364.
Stokes v. People, 53 N. Y. 764, §§ 106, 162, 188, 265, 331.
 v. State, 24 Miss. 621, § 46.
Stone v. Miller, 16 Penn. St. 450, § 292.
 v. People, 2 Scam. 326, § 130.
 v. Segur, 11 Allen, 568, § 163.
 v. State, 4 Humph. 27, § 402.
Storey v. Brennan, 15 N. Y. 524, § 351.
St. Peter's Church v. Beach, 26 Conn. 355, § 289.
Stratton v. Paul, 10 Iowa, 140, § 349.
 v. Staples, 59 Me. 94, § 295.
Straughan v. State, 16 Ark. 37, §§ 46, 458.
Strass v. Young, 36 Md. 246, § 270.
Strawn v. Cogswell, 28 Ill. 457, § 176.
Strohn v. R. R. Co. 21 Wis. 554, § 285.
Strong v. United States, 6 Wall. 788, § 316.
Stuart v. Simpson, 1 Wend. 376, §§ 107, 354.
Stubbs v. State, 47 Miss. 716, § 454.
Stubble v. London, & Co. L. R. 1 Exch. 13, § 357.
Stucke v. R. R. Co. 9 Wis. 182, § 344.
Suit v. Bonnell, 33 Wis. 180, § 236.
Sullivan v. Collins, 18 Iowa, 228, § 362.
 v. Holker, 15 Mass. 374, § 464.
 v. Honacker, 6 Fla. 372, § 300.
Sultzner v. State, 43 Ala. 24, § 306.
Sumner v. People, 29 N. Y. 337, § 293.
Surget v. Byers, Hempst. 715, § 268.
Surnall v. State, 29 Miss. 202, § 125.
Sutcliffe v. Gilbert, 8 Ohio, 405, §§ 421, 457.
 v. State, 18 Ohio, 469, § 450.
Suttle v. Batie, 1 Clark, 141, §§ 149, 154.
Sutton v. Dana, 1 Met. 383, § 444.
 v. State, 9 Ohio, 133, §§ 72, 135.
 v. State, 41 Tex. 513, § 202.
Suydam v. Williamson, 20 How. 427, § 438.
Swain v. Etling, 32 Penn. St. 486, § 292.
Swaine v. Great Northern R. R. Co. 10 Jur. N. S. 191, § 90.
Swan v. Tappan, 5 Cush. 104, § 270.
Swearingen v. Leach, 7 B. Mon. 285, § 310.
Swett, In re, 20 Pick. 1, § 119.
Swift v. Ins. Co. 2 Thomp. & C. 302, § 283.
 v. Town of Newbury, 36 Vt. 355, § 298.
Sykes v. Dunbar, Selwyn's N. P. 260, § 49.
Symmes v. Brown, 13 Ind. 319, § 305.
Symonds v. Pain, 6 Hurl. & N. 709, § 285.

T.

- Tabor v. Cook*, 15 Mich. 322, § 93.
 v. Daniels, 2 Cal. 240, § 308.
Tappan v. Evans, 11 N. H. 31, § 91.
Taylor v. California Stage Co. 6 Cal. 228, § 389.
 v. Lambe, 4 B. & C. 138, § 63.
 v. Lebeame, 14 Mo. 572, § 275.
 v. Western Pacific R. R. Co. 45 Cal. 323, § 165.
 v. Person, 2 Hawks, 298, § 89.
 v. Sorsby, 1 Mass. 97, § 404.

- Taylor v. Watkins, 26 Tex. 688, § 306.
 v. Willes, Cro. Car. 219, § 445.
 Tennant v. Hamilton, 7 Cl. & Fin. 122, § 245.
 Terry v. Sickles, 13 Cal. 427, § 356.
 Tevis v. Hicks, 41 Cal. 123, § 312.
 Thayer v. Ins. Co. 24 Penn. St. 560, § 436.
 Thelwall v. Yelverton, § 243.
 Thomae v. Zushlag, 25 Tex. Sup. 225, § 456.
 Thomas v. Bibb, 44 Ala. 721, § 98.
 v. Brown, 1 McCord, 557, § 474.
 v. Chapman, 45 Barb. 98, §§ 390, 410.
 v. Crosswell, 4 Johns. 491, § 72.
 v. Degraffenreid, 17 Ala. 602, § 291.
 v. Hatch, 3 Sumn. 170, § 470.
 v. Rumsey, 4 Johns. 482, § 72.
 v. State, 5 How. 20, § 135.
 v. State, 27 Geo. 287, § 140.
 Thomasson v. Groce, 42 Ala. 431, § 352.
 v. State, 22 Geo. 499, § 469.
 Thompson v. Commonwealth, 8 Gratt. 637, § 407.
 v. Franks, 37 Penn. St. 327, § 356.
 v. Mallett, 2 Bay, 94, § 404.
 v. People, 3 Park. Cr. 467, § 193.
 v. Perkins, 20 Iowa, 486, § 406.
 v. State, 30 Ala. 28, § 318.
 v. State, 24 Geo. 297, § 185.
 Thomson v. People, 24 Ill. 60, § 183.
 Thorn v. Bell, Hill & Denio, 430, § 276.
 Thrall v. Smiley, 9 Cal. 529, § 130.
 Thurston v. Kennett, 2 Fost. 151, § 213.
 v. Thornton, 1 Cush. 89, § 290.
 Thurtell v. Beaumont, 1 Bing. 339, §§ 247, 335.
 Thweat v. Finch, 1 Wash. 219, § 107.
 Tibbetts v. Perkins, 20 N. H. 275, § 94.
 Tift v. Moore, 59 Barb. 619, § 242.
 Tiley v. Moyers, 43 Penn. St. 404, § 305.
 Tilley v. Spaulding, 44 Ill. 80, § 472.
 Tillon v. State, 52 Geo. 478, § 465.
 Tilman v. Hatcher, Rice, 271, § 220.
 Tilton v. Beecher, § 232.
 Tims v. State, 26 Ala. 165, § 98.
 Tindal v. Brown, 1 T. R. 167, § 286.
 Tindle v. Nicholls, 20 Mo. 326, § 49.
 Tingley v. Cowgill, 48 Mo. 295, § 220.
 Tirgally v. Memphis, 6 Cold. 382, § 87.
 Tisdale v. Ins. Co. 28 Iowa, 12, § 314.
 Todd v. Old Colony R. R. Co. 3 Allen, 18, § 294.
 Toledo, &c. Co. v. Parker, 49 Ill. 385, § 288.
 Toel v. Commonwealth, 11 Leigh, 714, § 194.
 Tower v. Moore, 52 Mo. 118, § 112.
 Townley v. Deare, 3 Beav. 213, § 94.
 Towns v. Alford, 2 Ala. 378, § 227.
 Townsend v. Graves, 3 Paige, 453, § 91.
 v. Graves, 3 Paige, 457, § 91.
 Tracy v. Card, 2 Ohio St. § 405.
 Tradesmen's Bank v. Fairchild, 31 N. J. L. 371, § 92.
 Trammell v. McDade, 29 Tex. 360, § 226.
 Treat v. Riley, 35 Cal. 129, § 473.
 Trevor v. Wood, 36 N. Y. 307, § 290.
 Trew v. Ass. Co. 6 Hurl. & N. 838, § 283.
 Trimble v. State, 2 Greene, 404, § 183.
 Trudeau v. R. R. Co. 15 La. An. 717, § 471.
 Truebody v. Jackson, 2 Cal. 269, § 457.
 Truesdale v. Ford, 37 Ill. 210, § 289.
 Trullinger v. Webb, 3 Ind. 198, § 174.
 Trustees v. Hill, 12 Iowa, 462, § 340.
 v. Hubble, 62 Ill. 161, § 346.
 Tuberville v. State, 40 Ala. 715, § 332.
 Tuck v. State, 7 Ham. 240, § 56.
 Tucker v. Call, 45 Ind. 31, § 335.
 v. Cochran, 47 N. H. 54, § 413.
 v. Henniker, 41 N. H. 317, § 250.
 Tue v. Eber, 19 Ind. 126, § 453.
 Tuley v. Mauzey, 4 B. Mon. 5, § 445.
 Turner v. Ambler, 10 Q. B. 252, § 271.
 v. Smith, 18 Gratt. 831, § 436.
 Turns v. Commonwealth, 6 Met. 224, § 58.
 Turpin v. State, 4 Blackf. 72, § 434.
 Tweed v. Liscomb, 10 Hun, 760, § 106.
 Tyrell v. Lockhart, 3 Blackf. 136, § 460.
 U.
 Ulmer v. Leland, 1 Greenl. 134, § 216.
 Underwood v. Parks, 2 Str. 1200, § 265.
 v. White, 45 Ill. 437, § 337.
 Union Savings Bank v. Edwards, 47 Mo. 445, § 72.
 United States v. Alden, Sprague, 95, § 270.
 v. Battiste, 2 Sum. 243, § 376.
 v. Burroughs, 3 McLean, 405, § 423.
 v. Callender, § 183.
 v. Cole, 5 McLean, 513, § 434.
 v. Collins, 1 Woods, 499, § 155.
 v. Coolidge, 2 Gall. 364, §§ 56, 486.
 v. Darnaud, 3 Wall. Jr. 143, § 244.

- United States *v.* Dickenson, 2 McLean, 325, § 245.
v. Douglas, 2 Blatchf. 207, § 157.
v. Duval, Gilpin, 356, § 474.
v. Fries, 3 Dall. 515, § 137.
v. Gibert, 2 Sumner, 19, § 164.
v. Hanway, 2 Wall. Jr. 129, § 183.
v. Haskell, 4 Wash. C. C. 402, §§ 484, 487.
v. Hayward, 2 Gall. 485, § 217.
v. Insurgents, 2 Dall. 335, § 137.
v. Marchant, 4 Mason, 158, § 164.
v. Morris, 1 Curtis C. C. 23, § 194.
v. Mundel, 6 Call, 245, § 55.
v. Percz, 9 Wheat. 579, § 486.
v. Potter, 6 McLean, 186, § 465.
v. Reed, 2 Blackf. 435, §§ 46, 47, 53, 56, 131.
v. Reid, 12 How. 361, § 405.
v. Sander, 6 McLean, 598, § 274.
v. Shackelford, 18 How. 558, § 155.
v. Shive, 1 Bald. 512, § 376.
v. Tallman, 10 Blatchf. 21, § 115.
v. The Queen, 4 Ben. C. C. 237, § 83.
v. Tompkins, 2 Cranch, 46, § 51.
v. Travers, 2 Wheeler C. C. 490, § 270.
v. Waller, 1 Sawyer, 701, § 43.
v. Watson, 3 Ben. 1, § 486.
v. White, 2 Wash. 29, § 53.
v. Wilson, 1 Bald. 78, §§ 130, 160, 183.
v. Wilson, 6 McLean, 604, § 56.
- V.
- Vaden *v.* Ellis, 18 Ark. 355, § 201.
 Vaigneur *v.* Kirk, 2 Desaus. 640, § 92.
- Vaise *v.* Delaval, 1 T. R. 11, § 408.
 Valentine *v.* Packer, 5 Barr, 335, § 274.
 Valton *v.* Ins. Co. 22 Barb. 10, § 283.
v. National, &c. Ins. Co. 17 Abb. Pr. 268, § 171.
 Van Alst *v.* Hunter, 5 Johns. Ch. 148, § 90.
 Vanauken *v.* Beemer, 1 South. 364, § 150.
 Van Blarcom *v.* Frike, 5 Dutch. 517, § 306.
 Van Blaricum *v.* People, 16 Ill. 364, § 197.
 Van Buskirk *v.* Day, 32 Ill. 260, § 340.
 Vandewerker *v.* People, 5 Wend. 530, § 132.
 Vanhook *v.* State, 12 Tex. 252, § 47.
 Van Meter *v.* Kiltzmilller, 5 W. Va. 390, § 391.
 Van Norman *v.* Wheeler, 13 Tex. 316, § 469.
 Van Riper *v.* Van Riper, 1 South. 156, § 455.
 Van Schaick *v.* Third Av. R. R. Co. 38 N. Y. 356, § 265.
 Vanslyck *v.* Mills, 34 Iowa, 375, § 345.
 Van Swartow *v.* Commonwealth, 24 Penn. St. 131, § 98.
 Van Vacter *v.* McKillip, 7 Blackf. 578, § 185.
 Van Vaeter *v.* Walkup, 46 Cal. 124, § 325.
 Van Vechten *v.* Griffiths, 4 Abb. App. Dec. 487, § 324.
 Varona *v.* Socarras, 8 Abb. Pr. 302, § 247.
 Vattier *v.* State, 4 Blackf. 72, § 46.
 Vaughan *v.* Westover, 4 Thomp. & C. 316, § 236.
 Vermilyea, Ex parte, 6 Cow. 555, § 167.
 Vedder *v.* Fellows, 20 N. Y. 126, § 287.
 Verdier *v.* Hume, 4 Hen. & W. 479, § 472.
 Vertner *v.* Humphreys, 22 Miss. 130, § 268.
 Viele *v.* Germania Life Ins. Co. 26 Iowa, 9, § 212.
 Von Glahn *v.* Von Glahn, 46 Ill. 134, § 361.
 Von Latham *v.* Libby, 38 Barb. 343, § 271.
 Voorhis *v.* McGinnis, 48 N. Y. 278, § 301.
- W.
- Waffle *v.* Dillenbeck, 38 N. Y. 53, § 342.
 Waite *v.* White, 5 Ark. 640, § 472.
 Wakely *v.* Cooke, 4 Ex. 511, § 64.
 Wakeman *v.* Sprague, 7 Cow. 720, § 129.

- Walcot v. Brander, 10 Tex. 424, § 318.
 Walker v. Collier, 37 Ill. 362, § 203.
 v. Green, 3 Greenl. 215, § 134.
 v. Martin, 52 Ill. 347, § 371.
 v. Saubrinet, 13 Alb. L. J. 371, § 97.
 v. State, 37 Tex. 366, §§ 323, 336.
 v. Stetson, 14 Ohio St. 89, § 287.
 Wallace v. Columbia, 48 Me. 436, §§ 142, 198.
 Waller v. State, 40 Ala. 325, §§ 140, 178.
 Wallingford v. Dunlap, 14 Penn. St. 431, § 437.
 Walston v. Commonwealth, 16 B. Mon. 15, § 162.
 Walter v. People, 32 N. Y. 147, §§ 162, 178.
 Walters v. Junkins, 16 S. & R. 414, § 456.
 Waltham v. Pennebaker, 3 Bibb, 99, § 453.
 Ward v. Bourne, 56 Me. 161, § 292.
 v. Churn, 18 Gratt. 801, §§ 340, 346.
 v. Forrest, 20 How. Pr. 465, § 319.
 v. Henry, 19 Wis. 76, § 314.
 v. Hill, 4 Gray, 593, §§ 91, 92, 112.
 v. State, 1 Humph. 253, § 194.
 v. State, 2 Mo. 120, § 51.
 Ware v. Ware, 8 Greenl. 42, § 245.
 Warner v. Dunnavan, 23 Ill. 380, §§ 340, 347.
 Warren v. Commonwealth, 37 Penn. St. 45, §§ 139, 162.
 v. Gilman, 15 Me. 70, § 471.
 v. People, 3 Park. Cr. 544, § 97.
 Wash v. Commonwealth, 16 Gratt. 530, § 133.
 Washburne v. Cooke, 3 Denio, 110, § 270.
 Washington v. State, 17 Wis. 147, § 164.
 Washington Ins. Co. v. Wilson, 7 Wis. 169, § 335.
 Washington, &c. Ins. Co. v. Ins. Co. 5 Ohio St. 476, § 281.
 Waterford, &c. Turnpike v. People, 9 Barb. 161, § 161.
 Waters v. Bristol, 26 Conn. 399, §§ 372, 471.
 v. Walsh, Bendl. 263, § 16.
 Watkins v. Towers, 2 T. R. 281, § 107.
 v. Wallace, 19 Mich. 57, §§ 338, 346.
 v. Weaver, 10 Johns. 107, § 134.
 Watson v. Walker, 23 N. H. 471, § 404.
 v. Williams, 4 Blackf. 26, § 267.
 Watt v. Kirby, 15 Ill. 210, § 367.
 Weaver v. Eureka, &c. Co. 15 Cal. 272, § 284.
 v. Page, 6 Cal. 681, § 284.
 v. State, 24 Ohio St. 584, § 254.
 Webber v. State, 10 Mo. 4, § 385.
 Weber v. Kingsland, 8 Bosw. 417, § 342.
 Webster v. Clark, 10 Fost. 245, § 229.
 Webster's case, 5 Greenlf. 432, § 58.
 Weil v. Kume, 49 Mo. 153, §§ 91, 93.
 Weis v. State, 22 Ohio St. 496, § 403.
 Welborn v. Spears, 32 Mi-s. 138, § 202.
 Welch v. Fourier, 6 Ala. 516, § 418.
 Wells v. Caldwell, 1 Marsh. 442, § 103.
 v. Garland, 2 Va. Cns. 475, § 432.
 v. Prince, 15 Grav. 562, § 337.
 v. Waterhouse, 22 Me. 131, § 472.
 Welstead v. Levy, 1 M. & R. 138, § 308.
 Wendall v. Safford, 12 N. H. 171, § 470.
 Westbrook v. Van Auken, 2 South. 478, § 435.
 Westmoreland v. State, 45 Geo. 225, § 185.
 West. Transp. Co. v. Hawley, 1 Daly, 327, § 274.
 Wetherbee v. Norris, 103 Mass. 565, § 342.
 Wey v. R. R. Co. 35 Iowa, 585, § 355.
 Wickwire v. State, 19 Conn. 477, § 56.
 Widdifield v. Widdifield, 2 Binn. 245, § 107.
 Wiggin v. Coffin, 3 Story, 1, § 469.
 v. Plumer, 31 N. H. 251, § 388.
 Wiggins v. Holley, 11 Ind. 2, § 356.
 Wigglesworth v. Atkins, 5 Cush. 212, § 215.
 Wightman v. Western M. & F. Ins. Co. 8 Rob. 442, § 335.
 Wilburn v. State, 21 Ark. 198, § 46.
 Wilcox v. Rome, &c. R. R. Co. 39 N. Y. 358, § 294.
 v. School District, 6 Foster, 303, § 130.
 v. State, 3 Heisk. 110, § 346.
 Wiley v. State, 4 Blackf. 458, § 161.
 Wild v. Came, 98 Mass. 152, § 291.
 v. Hudson, &c. R. R. Co. 29 N. Y. 315, § 298.
 Wild's Adm'x v. Hudson, &c. R. R. Co. 24 N. Y. 530, § 297.
 Wilder v. City, 12 Minn. 190, § 306.
 v. Cowles, 100 Mass. 487, § 345.
 Wilkins v. Anderson, 11 Penn. St. 399, § 254.
 Willet v. Porter, 42 Ind. 250, § 450.
 Willey v. State, 46 Ind. 363, § 171.
 Williams v. City Council, 4 Geo. 509, § 95.
 v. Commonwealth, 2 Gratt. 567, § 484.
 v. Commonwealth, 29 Penn. St. 108, § 336.

- Williams v. O'Keefe*, 9 Bosw. 536, § 298.
v. Port, 9 Ind. 551, § 107.
v. Robinson, 42 Vt. 658, § 220.
v. Sargent, 46 N. Y. 481, § 231.
v. Smith, 2 B. & Ald. 496, § 285.
v. Smith, 6 Cow. 166, § 169.
v. State, 47 Ala. 659, § 323.
v. State, 8 George, 407, § 118.
v. State, 10 Ind. 503, § 380.
v. State, 3 Kelly, 453, §§ 169, 195.
v. State, 32 Miss. 396, §§ 376, 381.
v. State, 12 Ohio St. 622, § 113.
v. Town of Clinton, 28 Conn. 264, § 298.
v. Woods, 16 Md. 220, § 319.
Willing v. Swasey, 1 Browne, 123, § 408.
Wilson v. Abrahams, 1 Hill, 207, § 400.
v. Berryman, 5 Cal. 44, § 406.
v. Day, 2 Burr. 827, § 266.
v. Hanson, 20 N. H. 375, § 292.
v. James, 3 Blatchf. 227, § 472.
v. McCullough, 23 Penn. St. 440, § 226.
v. People, 4 Park. Cr. 619, § 329.
v. Simonton, 1 Hawks, 482, § 101.
v. State, 6 Ark. 601, § 113.
v. State, 42 Ind. 224, § 138.
Windham v. Williams, 27 Miss. 313, §§ 201, 417.
Winnesheik Ins. Co. v. Schneller, 60 Ill. 465, § 176.
Winship v. Buzzard, 9 Rich. 105, § 302.
Winsor v. Queen, 118 Eng. L. & Eq. 141, §§ 455, 475, 478.
Winston v. Miller, 12 Sm. & M. 550, § 107.
v. Wales, 13 Mo. 569, § 368.
Wise v. Booley, 32 Iowa, 34, § 393.
v. State, 2 Kan. 419, § 332.
Wisler v. Holderman, 40 Ind. 106, § 439.
Whaley v. State, 11 Geo. 123, § 193.
Whallon v. Bancroft, 4 Minn. 109, §§ 87, 113.
Wheeler v. Schroeder, 4 R. I. 383, § 300.
v. State, 24 Wis. 52, § 80.
White v. Bailey, 14 Conn. 271, § 291.
v. Claves, 32 Ill. 325, § 471.
v. State, 16 Tex. 445, § 178.
Whitehurst v. Coleen, 53 Ill. 247, § 87.
Whitfield v. Westbrook, 40 Miss. 311, § 314.
Whitner v. Hamlin, 12 Fla. 18, § 190.
Whittaker v. Perry, 38 Vt. 108, § 319.
Whitten v. State, 47 Geo. 297, § 361.
Whittlesly v. Kellogg, 28 Mo. 404, § 305.
Wood v. Commissioners, 1 Morris, 441, § 449.
v. McGuire, 17 Geo. 361, § 463.
v. Stoddard, 2 Johns. 194, § 169.
v. Thompson, 5 Jur. 708, § 73.
v. Wood, 52 N. H. 422, § 444.
Wood's case, 7 Leigh, 743, § 254.
Woods v. Gassett, 11 N. H. 442, § 310.
v. Ins. Co. 50 Mo. 112, § 280.
v. Rowan, 5 Johns. 133, §§ 134, 153.
v. State, 43 Miss. § 396.
Woodbury v. Taylor, 3 Jones L. 504, § 305.
Woodin v. People, 1 Park. Cr. 464, § 247.
Woodman v. Chesley, 39 Me. 45, § 300.
Woodnut v. Knowles, 14 Ohio St. 18, § 288.
Woodsides v. State, 2 How. (Miss.) 655, § 48.
Woodward v. Hancock, 7 Jones, 384, § 296.
v. Leavitt, 107 Mass, 453, § 408.
Woodworth v. Barker, 1 Hill, 172, § 310.
Worcester Med. Inst. v. Harding, 11 Cush. 285, § 304.
Work v. State, 2 Ohio St. 296, §§ 76, 97.
Wormely v. Commonwealth, 10 Gratt. 658, § 160.
Wright v. Beckett, 1 M. & Rob. 414, § 230.
v. Carpenter, 49 Cal. 608, § 370.
v. Columbian Ins. Co. 2 Johns. 211, § 72.
v. People, 2 Greene, 191, § 451.
v. State, 18 Geo. 383, § 183.
v. Stuart, 5 Blackf. 120, § 153.
v. Wilcox, 19 L. J. C. P. 233, § 213.
Wrocklege v. State, 1 Clarke, 167, § 203.
Wroe v. State, 20 Ohio St. 460, § 247.
Wyatt v. Noble, 8 Blackf. 507, § 165.
v. State, 1 Blackf. 25, § 395.
Wynehamer v. People, 13 N. Y. 378, §§ 87, 97.

TABLE OF CASES.

583

Y.

Yates v. Allen, 41 Barb. 172, § 269.
 Yates v. Olmstead, 56 N. Y. 632, §
 267.
 Yeaton v. Yeaton, 36 Me. 248, § 301.
 Yinling v. Kohlhaas, 18 Md. 148, § 338.

Yoe v. People, 49 Ill. 410, § 251.
 Young v. Commonwealth, 6 Binn. 93,
 § 64.

Z.

Zabriskie v. Smith, 13 N. Y. 322, § 311

INDEX.

A.

- Abandonment** — in cases of insurance, § 279.
- Abinger, Lord** — construction of Fox's Libel Act by, § 384.
- Abstract** — instructions condemned, § 314.
- Acceptance** — generally a question of fact, § 291.
- Accomplices** — as witnesses before jury, value of their testimony, § 365.
how testimony of should be regarded, § 365.
- Admissibility of evidence** — court to decide on, § 307.
rules governing, § 309.
- Affidavits** — received to show verdict obtained by chance, § 410.
- Affidavits of jurors** — regarding verdict not generally admissible, § 408.
not received to set aside verdict, § 408.
received in support of verdict, § 408.
as to verdict, when admitted, § 410.
- Affirmative of issue** — party holding has right to begin, § 212.
if with defendant, he begins, § 214.
- Affording the jury** — manner of, § 25.
- Age** — at which jurors can serve, § 118.
as a cause of challenge, § 172.
- Agency** — as a question of law or fact, § 275.
distinction between general and special, § 275.
- Agent** — whether a person be, to qualify as a witness, decided by court, § 308.
- Agents** — in insurance, representations of, § 278.
powers of in insurance cases, how far question of law or fact, § 278.
- Alfred** — severe treatment of judges by, § 12, n.
regulations in reference to Frithborh, § 13.
- Allen** — cannot serve on a jury, § 116.
- Alienage** — as a cause of challenge to a juror, § 172.
- Amendment** — of special verdict, § 440.
of verdict to be made in presence of jury, § 461.
of verdict more freely allowed in England, § 458.
of verdict not generally in criminal cases, § 458.
of verdict when omission to assess damages, § 461.
of verdict, in what cases allowable, § 461.
of verdict in criminal case, when proper, § 459.
of verdict, provision for in California, § 459.
- Anglo-Saxon** — methods of trial, § 12.

- Anglo-Saxon Courts** — character and functions of, § 14.
- Anglo-Saxon law** — nature and character of, § 19, n.
- Anglo-Saxons** — character of their popular assemblies, § 20.
 inquiry as to existence of jury trial among, § 11.
 jury trial among, opinions of various writers, § 11, n.
- Arbitration** — determined questions in dispute, § 2.
- Argument of counsel** — to jury now guaranteed by constitutional provisions, § 248.
 can be controlled by court, § 249.
 to be confined to the evidence, § 250.
 may be prevented on a topic on which no evidence, § 250.
 how far may comment on persons, § 252.
 significance and importance of, § 248, n.
 to be allowed license to comment on parties, § 255.
 limiting time of, § 254.
 responsibility for statements and comments in, § 255.
- Argument on the law** — to the jury, how far permitted, § 253.
 to jury may be stopped by court, § 253.
- Array** — challenge to, meaning of, § 148.
- Assemblies** — representative, nature and functions of, at first, § 3.
- Assessment of damages** — excessive, how corrected, § 371.
 province of jury in, generally exclusive, § 371.
 rules as to, laid down, § 372.
 neglect of, in verdict, § 415.
- Attaint** — nature and purpose of, § 32.
 corrected, wrong action of jury, § 374.
- Authorities** — right to read in argument, § 251.
 may be read as illustration in argument, § 251.
- Authority** — whether a question of law or fact, § 273.
 as to its extent, whether a question of law or fact, § 275.
 of a special agent a question of law, § 275.
 as to its existence, a question of law or fact, § 274.
- Autrefois acquit** — when pleaded, § 491.

B.

- Barrington, Sir Jonas** — his account showing the responsibility of counsel, § 255, n.
- Begin, right to** — where a party relies on a negative averment, § 216.
 how determined, § 212.
 by defendant when plaintiff's cause of action admitted, § 214.
 if refused error, § 222.
 before a jury in a criminal case, § 211.
 when the knowledge of an allegation is confined to the other party, § 217.
 when the plaintiff has any one issue to prove, § 213.
 lies with a party setting up a will, § 220.
 party holding affirmative has, § 212.

- Begin, right to — Continued.**
 by the defendant when he admits plaintiff's whole cause of action, § 215.
- Bentham** — his opinion of cross-examination, § 240.
 on Art of Packing Juries, § 77.
 his opinion of special jury, § 71.
- Bias** — or prejudice as a cause of challenge, § 176.
- Bill of rights** — provision in, for jury trial, § 114.
- Boundaries of land** — as a question of law or fact, § 305.
 when parol testimony resorted to, a question of fact, § 305.
- Bracton** — his reference to jury trial, § 27.
- Brandy** — juror drinking, § 402.
- Britton** — legal treatise in time of Edward I., § 31.
- Brougham, Lord** — his cross-examination of witnesses on trial of Queen Caroline, § 236.
 his reputation in cross-examination, § 232.
- Browbeating witnesses** — condemned by many, §§ 234, 240.
- Bushell's case** — instruction of court to jurors in, § 34.

C.

- Canute** — law of, in reference to Frithborh, § 13.
 law of, in reference to persons slain, § 13.
- Caption** — of indictment, in what respects amended, § 60.
 of indictment, what should show, § 54.
- Challenge** — because of age, § 172.
 for bias or prejudice, § 176.
 for cause, destruction of, § 167.
 for cause, how ascertained, § 166.
 for cause to the polls, nature of, § 166.
 for interest in the cause, § 169.
 for opinions formed, § 180.
 for principal cause and favor indefinite, § 167.
 for principal cause, for what allowed, § 168.
 for service on a previous jury, § 189.
 for want of statutory qualifications, § 171.
 of a juror for relation or kindred, § 174.
 of jurors in various trials, forms of, § 183, n.
 on account of conscientious scruples, § 178.
 on account of hostility, § 175.
 on account of social or business relations, § 177.
 peremptory, not allowed generally to special jury, § 75.
 right of, an ancient one, § 146.
 to grand jury in California, § 47, n.
 to a grand jury in New York, § 47.
 to a grand jury, when and where allowed, § 47.
 to the array for favor, causes of, § 151.
 to the array for favor, causes of not definite, § 151.

Challenge — Continued.

- to array, form of, § 150, n.
- to array for principal cause, § 150.
- to the array, instances in which allowed, § 153.
- to the array, instances in which denied, § 154.
- to the array of grand jury not usual, § 47.
- to the array now restricted, § 152.
- to the array, on what based, § 149.
- to the array, statutory provisions respecting, § 152.

Challenges — allowed by Romans, § 146.

- for any cause now generally determined by court, § 167.
- for principal cause stated in *Fleming v. State*, § 168.
- in criminal cases made first by prisoner, § 194.
- several kinds of, § 148.
- time when to be taken, § 194.
- to the favor, little regarded now, § 191.

Challenging — its meaning and object, § 146.**Chance verdict — generally erroneous, § 406.**

- valid, if no previous agreement to take, § 406.

Charge to the grand jury — object of, § 50.

- record need not show it was given, § 50.
- what to contain according to *Chitty*, § 50.

Chattel mortgages — fraud in relation to, § 267.**Civil procedure — among Anglo-Saxons, § 19.****Clarendon — constitutions of, provisions in reference to accusations for crime, § 28.**

- constitutions of, reference to jury trial, § 26.

Cockburne, Ch. J. — opinion as to securing unanimity, § 77.**Coke — his abuse of Sir Walter Raleigh, § 232.**

- opinion against discharge of jury without verdict in a criminal case, § 476.

Comitia of Rome — character of, § 4.

- occasionally delegated its criminal power, § 7.
- was a sort of judicial council, § 7.

Commissioners of jurors — make out jury lists, § 124.**Compurgation — how conducted, § 12.**

- as a method of trial when not resorted to, § 18.

Compurgators — who were, and number, § 12.**Concealment — whether a question of law or fact, § 280.****Confessions — force of, as evidence before jury, § 366.**

- instructions regarding, § 366.

Congress — law of, in reference to influencing grand jurors, § 52.**Conqueror — erroneous impression regarding his changes in the laws, § 21.**

- nature of the changes he introduced, § 22.
- gave prominence to ecclesiastical element, § 22.
- instituted ecclesiastical courts in England, § 22.

Conscientious opinions — challenge for, § 179.**Conscientious scruples — challenge on account of, § 178.**

- Conspiracy** — verdict in cases of, § 434.
- Constitution of United States** — guarantee of jury trial in, § 83.
 - as to limits of jury trial under, § 98, n.
- Constitutional right** — of jury trial, § 87.
- Contempt** — right to punish for, with jury trial, § 103.
- Contract** — building, meaning of words in, § 304.
 - performance of, a matter of fact, § 304.
 - validity of, a question of law, § 303.
- Contributory negligence** — strict doctrine of New York courts respecting, § 295, n.
 - generally a question of law, § 297.
- Cooley** — his views in regard to "former jeopardy," § 487.
- Coronsæd** — a species of trial by ordeal, § 12.
- Coroner** — bound to deliver personal property to owner, § 65.
 - can issue warrants for arrest of accused, § 66.
 - can punish witnesses not attending, § 66.
 - duty of, in respect to returning evidence, § 65.
 - his importance in early English history, § 62.
 - venire directed to, in certain cases, § 134.
- Coroner's jury** — its history, § 62.
 - number required on, § 63.
 - powers once commensurate with grand jury, § 62.
- Coroner's power** — to summon witnesses, § 66.
- Coroners** — deprived of power to hold pleas by Magna Charta, § 62.
- Costs** — not to be added to verdict, § 413.
- Counsel** — duty of, in opening case to jury, § 209.
 - privilege to be represented by, formerly denied, § 205.
 - privilege to be represented by, given by statute, § 206.
- County court of Anglo-Saxons** — presided over by sheriff, § 15.
 - term and functions of, § 15.
- Court and jury** — distinction between duties, § 306a.
- Court** — as to its province and duty generally, § 307.
 - right of, to instruct on the law, § 325.
 - should not privately communicate with jurors, § 348.
 - to instruct in the law in reference to the case, § 325.
- Court of the hundred** — term and functions of, § 16.
 - president of, § 16.
- Courts of Anglo-Saxons** — use and character of, § 14.
- Cox** — his advice as to manner of cross-examination, § 240, n.
- Crime** — detection and punishment of, in Anglo-Saxon law, § 17.
 - nature of, among Anglo-Saxons, § 17.
 - early mode of punishment of, § 17, n.
 - what questions involving, cannot be asked, § 244.
- Crime, conviction for** — in cross-examination, § 242.
 - must be shown by record in cross-examination, § 242.
- Criminal cases** — great care required in instructions, § 327.
 - jury trial in, guaranteed by Constitution, § 85.
- Criminal procedure** — among Anglo-Saxons, § 17.

Cross-examination — fears in reference to, § 232.

- nature and purpose, § 234.
- certain rules respecting, § 235.
- as to memory or recollection, § 237.
- leading questions allowed in, § 239.
- license allowed in, § 232.
- limit of, in discretion of court, § 241.
- qualities required for, in counsel, § 223.
- to show motive or interest, § 236.
- questions on collateral matters, how far contradicted, § 245.
- restriction on, § 241.
- questions in, on irrelevant matter allowed, § 245.

Curia regis — a name given to county court after the Norman settlement, § 22.

D.

Dacres, Lord — his case in time of Henry VIII., § 35.

Damages — compensatory, instructions relating to, § 342.

- exemplary, erroneous instructions in regard to, § 341.
- exemplary, erroneous instructions respecting, § 314.
- instructions relating to, § 341.
- exemplary, when instructions should be given as to, § 343.

Dedication — a question of fact, § 306.

- what shall constitute a question of law, § 306.

Delivery — constructive, when made, § 291.

- whether a question of law or fact, § 290.

Demont, Louisa — her examination in trial of Queen Caroline, § 236.

Detinues — verdict in case of defective, § 446.

Devisavit vel non — issue of, to be tried by jury, § 90.

Dikasteries of Athens — nature and functions of, § 6.

- very similar to juries, § 6.
- opinion of Grote in reference to, § 6, n.

Discharge of juror — against prisoner's objection, § 488.

- if allowable, § 488.
- when served on grand jury, § 488.

Discharge of jury — according to Doctor and Student, § 476.

- power to, formerly denied, § 475.
- as laid down in *U. S. v. Perez*, § 486.
- according to Lord Hale, § 477.
- according to rule in *Winsor v. Queen*, § 478.
- proper in cases of overwhelming necessity, § 479.
- in capital cases, § 484.
- in cases of felony, § 480.
- in criminal cases, within discretion of court, § 482.
- in criminal cases without verdict, § 475.
- in what cases without verdict, § 478.
- not approved by Coke without verdict, § 476.
- now allowed in all cases where great necessity exists, § 485.

Discharge of Jury — Continued.

when one juror insane, § 485.

when may be claimed as an acquittal, § 487.

when proper in criminal case, § 40.

Disgrace — questions tending to, not allowed to be put, § 241a.

E.

Baldorman — a general Saxon name for a presiding officer, § 15.

Edgar — laws of, in reference to witnesses for contracts, § 15.

laws of, relating to court of hundred, § 16.

Saxon law of, in reference to Frithborh, § 13.

Edward — Anglo-Saxon laws of, § 12.

Edward I. — important changes in English law by, § 31.

legal writers in time of, § 31.

styled the "English Justinian," § 31.

Effect — most regarded in determining legal quality of certain act, § 272.

Ejectment — verdict in, § 447.

verdict finding portion claimed, § 447.

Ekklesia of Athens — character of, § 4.

Elisors — when appointed to summon jury, § 134.

Eminent domain — as to right of a jury in proceedings in, § 104.

jury trial in proceedings in, granted in some States, § 104.

English language — jurors required to understand, § 118.

Equity — at what time jury trial may be demanded, § 94.

provision for jury trial in, by Texas Constitution, § 89.

right to jury trial a matter of discretion in, § 89.

in what cases in, jury trial a matter of right, § 90.

cases in which a jury trial has been allowed, § 92.

cases in which jury trial has been denied, § 93.

Erskine — his address to jury on trial of Lord George Gordon, § 223.

his opposition to the court on the trial of the Dean of St. Asaph, § 249.

maintained right of jury to judge law, § 39.

Ethelred — important law of, relating to accusations, § 16.

originates an accusatory body like grand jury, § 18.

Evidence — admissibility of under control of court, § 308.

circumstantial, §§ 333, 336.

commenting on weight of, in instructions, § 322.

conflicting, rule as to, § 367.

conflicting, verdict not set aside for, § 473.

of grand juror before his fellows, § 55.

of grand jurors, generally, § 49.

instructions on amount of, § 330.

instructions on sufficiency of, § 321.

privileged before coroner, § 67.

rules of law affecting the duty of the court to declare, § 307.

its sufficiency and weight for jury, § 368.

sufficiency of, respective province of court and jury, § 365.

when conflicting, must be decided by jury, § 367.

- Examination in chief** — duty of counsel respecting, §§ 224, 230.
Exemption — of jurors, who exempted. § 119.
 from jury service, § 120.
Extracts — reading by court for instructions condemned, § 344.

F.

- Facts** — most important element in early judicial decisions, §§ 2, 5.
 not to be assumed, in instructions, § 316.
 their nature, § 258.
 are actual, as opposed to what is supposititious, § 258.
 physical and psychological, § 259.
 principal and evidentiary, § 259.
 their classification, § 259.
 when court may decide, § 310.
Felonies — exception of petit larceny, to be tried by jury, § 96.
Field, Justice — his charge to a grand jury, § 52.
Findings — special effect of, on general verdict, § 439.
Finlayson — his description of prosecution for crime in Anglo-Saxon law,
 § 17, n.
Fleta — nature and importance of treatise, § 31.
Former jeopardy — when one in, § 487.
Porteus's treatise — *De Laudibus Legem Angliæ*, § 34.
Fox's Libel Act — § 383.
 intent of, § 39.
 force and effect of, § 384.
 as construed in United States, § 385.
 opinion of Lord John Russell, as to, § 384.
Fraud — as a question of law or fact, § 266.
 generally a question of fact, § 266.
 in respect to chattel mortgages, § 267.
 in sale of property as a question of law or fact, § 268.
 in sale of property may be a question of law, § 268.
 often determined as a question of law, § 266.
 various instances of, as questions of law or fact, § 269.
Fraudulent representations — in policy of insurance, § 281.
Freeholders — jurors to be, in some States, § 115.
Frithborh — nature of, among Anglo-Saxons, § 13.

G.

- General Verdict** — meaning and effect of, § 418.
 for plaintiff, what includes, § 418, n.
 finding "the issues joined in the case," § 418, n.
 valid if there be some good counts, §§ 418, 423.
 what implied by, in ejectment, § 418.
 when general issues and special pleas are pleaded, § 418.
 cures formal defects in pleading, § 419.

General Verdict—*Continued.*

- will not cure an omission of cause of action, § 420.
- in action of tort, to be several, § 421.
- as to two or more defendants, § 421.
- on indictment containing several counts, § 423.
- finding guilty of part, § 426.
- of guilty, what implied by, § 424.
- effect of, in grand larceny, § 424.
- guilty on some, acquittal on other counts, § 425.
- different offences being charged, § 425.
- for less than charged, § 429.
- addition of irrelevant matter to, § 432.
- where several indicted, § 433.
- where jury agree as to some only, § 434.
- in cases of riot and conspiracy, § 434.

Glanville—his treatise on English law, § 22.

his description of the grand assize, § 26.

Gordon, Lord George—examination of witness in trial of, § 223.**Godwin, Earl of**—died in act of swallowing *Cornsaed*, § 12.**Grand**—as distinct from petit jury, uncertain as to the time when it became a separate body, § 33.**Grand assize**—how jurors were selected for, § 25.

of Henry II., nature of, § 25.

in reality a jury, § 26.

Grand juror—as to evidence of, in jury room, § 55.

challenged, in time of Edward I., if on petit jury, § 33.

in some places incompetent over sixty years of age, § 44.

Grand jurors—qualifications according to Lord Hale, 44.

when permitted to testify in regard to occurrences in the grand jury room, § 49.

fining of, formerly, § 56.

injunction of secrecy on, § 49.

manner of swearing, § 48, n.

Grand jury—not distinct from trial jury in time of Edward I., § 28.

origin and establishment of, § 41.

regard for, in English communities, § 42.

powers liable to abuse, § 42.

functions of, various opinions as to value of, § 42.

when action by, is necessary, § 43.

provisions for in our Constitutions, § 43.

property qualification required in members, § 44.

qualifications required in members, § 44.

great care in organization of, § 44.

manner of selection in New England, § 45.

number composing, § 45, n.

manner of selection in New York, § 45.

manner of selection under laws of United States, § 45.

manner of, selection of, § 45.

Grand jury — Continued.

- how summoned, § 46.
- effect of omissions to comply with mode of summoning, § 46.
- oath of, § 48.
- its powers and duties, § 51.
- personal influence on condemned, § 52.
- different ways in which may act, § 51.
- to judge of the credibility of evidence, § 53.
- mode of returning bills formerly, § 58, n.
- right of prosecuting officer to be present with, § 57.
- discharge of, § 61.
- must find a true bill, or nothing, § 53.
- its powers limited to the county, § 54.

Great charter — of Henry III., provision in, as to criminals, § 23.

Grote — his description of trials at Athens, § 4.

Guizot — opinion as to state of Europe at decline of Roman empire, § 14.

Gulathing — code or law of, in Norway, § 9.

Gundulf, Bishop of Rochester — contest between, and Pichot, in relation to land, referred to a jury, § 23.

H.

Hale, Sir Matthew — high opinion of English law in time of Edward I., § 31.

Hawles, Sir John — condemned presence of officers with grand jury, § 57.

Hostility — as a cause of challenge, § 175.

Hundred court — important court of Anglo-Saxons, § 16.

great police court of Anglo-Saxons, § 17.

Hundredors — who were, § 16.

must be on jury till time of George IV., § 34.

Hypothetical facts — instructions on, § 315.

Hypothetical opinions — are held not a cause of challenge, § 184.

I.

Impanelling of the jury — meaning and importance of, § 145.

Impeaching one's own witness — not generally permitted, § 231.

Ince, John — his letter to Sancroft regarding trial of bishops, § 77, n.

Indictment — proceeding to trial on, certain defects waived, § 44.

meaning and effect of, § 51.

for crime, begun in one, consummated in another county, § 54.

what omission in caption of, is immaterial, § 54, n.

what caption of, should show, § 54.

power of court over, § 56.

oral testimony cannot be admitted to contradict, § 56.

court may return, for amendment, § 56.

signature of foreman of grand jury to, § 58.

signature of foreman to, manner of signing, § 58.

Indictment — Continued.

- must be returned into court, § 59.
- amendment of, when made, § 60.
- bad counts in, in case of verdict, § 423.
- cannot be amended except by consent of jurors, § 60.
- containing several counts, verdict on, § 423.
- verdict varying from, § 448.

Infamous crime — an indictment necessary for, § 51.

- a person entitled to jury trial for, § 96.

Infamous punishment — what is, § 96.**Infamy —** jurors not to be questioned as to their own, § 196**Inferior courts —** jurisdiction of, § 99.**Information —** misdemeanor prosecuted by, § 44, n.**Inquest —** in regard to *felo de se*, § 68.

- equivalent to an indictment, § 68.

Inquest of coroner — nature and effect of, § 64.**Instructions —** the purpose of, § 311.

- as to issues in pleadings, § 312.
- upon an assumed state of facts, § 313.
- should be confined to the issues, § 313.
- upon abstract points of law condemned, § 314.
- on hypothetical facts, condemned, § 315.
- on hypothetical facts, allowable in some cases, § 315.
- assuming facts, faulty, § 316.
- may be given, assuming certain facts, § 317.
- on facts not admitted, not cured by stating the law correctly, § 318.
- that single out particular facts reprehensible, § 319.
- grouping certain facts not approved, § 320.
- on sufficiency of evidence, § 321.
- on weight of evidence forbidden by statute, § 322.
- commenting on weight of evidence, erroneous, § 322.
- on weight of evidence will often be sufficient to reverse a judgment, § 323.
- on weight of evidence when not erroneous, § 324.
- in criminal cases, more precise, § 327.
- on grade or character of offence, § 328.
- where different offences are charged, § 329.
- when assault and battery charged, § 329.
- on nature and amount of evidence, § 330.
- on express or implied malice, § 331.
- on reasonable doubt in criminal cases, § 332.
- in civil cases as to reasonable doubt, § 335.
- faulty that suggest inferences, § 336.
- may be faulty being obscure, § 338.
- in relation to damages, § 341.
- relative to compensatory damages, § 342.
- relative to exemplary damages, § 343.
- not improper in language of a higher court, § 344.

Instructions — Continued.

- mode of giving, by reading extracts, § 344.
- should be clear and unambiguous, § 346.
- bad, when words falsely used, § 346.
- conflicting or inharmonious condemned, § 345.
- long and in verbose language condemned, § 347.
- should be given in open court, § 348.
- should be in writing in certain States, § 349.
- how far must be in writing, § 350.
- Insurance** — when a question of law or fact, § 277.
 - policy to be interpreted by court, § 277.
 - province of jury in questions of limited, § 277.
 - various questions of law and fact as to, § 283.
- Intent** — whether a question of law or of fact, § 265.
 - in general, a question of fact, § 265.
 - may be inferred often from act, § 265.
 - necessary to be found to constitute a crime, § 265.
- Interest** — as a cause of challenge, § 169.
 - in an association or body as a cause of challenge, § 169.
 - private, as a cause of challenge to a juror, § 169.
 - public or corporate, a cause of challenge, § 169.
- Intoxicating liquor** — effect of jurors taking, in New York, § 400.
 - jurors drinking, § 398.
 - jurors taking, ruling of courts in Massachusetts, § 401.
 - use of by jurors, in Western States, § 403.
- Issue** — verdict finding less than, § 444.
- Issue joined** — reference to, in jury's oath, § 201.
- Issues** — instructions should be confined to, § 313.
 - where some are found, § 444.
- Issues in equity** — trial of, by jury, at discretion of court, § 91.
 - what may be entitled to jury trial, § 90.
- Issues in pleadings** — instructions as to, § 312.

J.

- Judex** — function of, in Roman law, § 7.
- Judicium Dei** — a character of the Ordeal, § 12.
- Judicium Parium** — signification of, in Magna Charta, § 24.
- Jurata Patriæ** — doubtful if sworn before Conquest, § 27.
 - signification and importance of term, § 27.
 - selected from the neighborhood, § 27.
- Jurors** — on grand assize punished severely for perjury, § 25.
 - were witnesses in time of Edward I., § 29.
 - made use of personal knowledge in time of Charles II., § 34.
 - become judges of the effect of evidence in reign of Henry VI., § 34.
 - gradually cease to be mere witnesses, § 34.
 - property qualifications required, § 115.
 - to be freeholders in Indiana, § 115.

Jurors — Continued.

- to be physically and mentally capable, § 118.
- for what causes may be discharged from panel, § 139.
- required to be citizens and electors, § 171.
- character of, how regarded in selection, § 117.
- selection how made in New England, § 121.
- trying prisoners on one indictment, not disqualified to try others on the same indictment, § 190.
- not to be asked questions tending to disgrace, § 196.
- excusing or discharging from panel, § 139.
- drinking intoxicating liquor, § 398.
- not to use expressions in regard to cause, § 388.
- personal knowledge of may be evidence, § 369.
- should not privately communicate with court, § 348.
- taking papers or books to jury room, § 404.
- drinking intoxicating liquor, how regarded in certain Southern States, § 402.
- not to receive information from fellows, § 393.
- not to converse with officers in charge, § 391.
- questions to, in challenging, § 195.
- not generally permitted to give affidavits as to verdict, § 408.
- personal knowledge of, § 369.
- requirement of law as to their conduct, § 386.
- improperly conversing in regard to cause, § 390.
- sleeping, effect of, § 387.
- how far expression of opinion by, vitiates, § 389.
- not to seek or obtain information outside of evidence, § 392.
- taking refreshment, § 398, n.
- improper conduct of, in regard to expressions of opinion, § 389.

Jury — history of, in what manner traced, § 1.

- number of, in Scandinavia, § 9.
- number of, generally twelve everywhere, reason of, §§ 9, n.; 19, n.
- not much in use in criminal cases in time of Normans, § 28.
- punished for giving verdict against wishes of crown, § 38.
- importance of a careful selection of, § 114.
- by whom summoned, § 134.
- number returned on venire, § 137.
- when error to allow to separate, § 395.
- duty in respect to their deportment, § 359.
- denied right to decide law in New York, § 378.
- to determine the facts in issue, § 360.
- separation of during trial, § 394.
- province and duty, § 358.
- how far have right to decide law, § 373.
- duty in respect to the issue, § 359.
- right of to decide on law in Pennsylvania, § 379.
- right of to decide on law in Southern States, § 381.
- summoning of, mode of must appear, § 133.

Jury — *Continued.*

often have power if not right to decide law, § 375.
 to judge of sufficiency and weight of evidence, § 368.
 to judge of credibility of witnesses, § 361.
 generally denied right to decide on law, § 376.
 after retiring cannot separate, § 397.
 power of, in indictments for libel, § 382.
 right of to decide law in Western States, § 380.
 viewing premises, § 370.

Jury lists — to be filed, § 126.**Jury trial** — imperfect protection of, in time of Tudors and Stuarts, § 8.

whether existed among Anglo-Saxons, § 11.
 not unknown to Anglo Saxons in principle, § 11.
 dependent on character and form of government, § 8.
 cannot be found in Anglo-Saxon times, as it now exists, § 11.
 some of the features of, known to Anglo-Saxons, § 20.
 not exactly found in Anglo-Saxon times, § 20.
 instance of, in reign of William I., § 23.
 gradual development of, § 30.
 in time of Stuarts, § 37.
 limits of the constitutional right, § 87.
 waiver of, § 110.
 whether right is abridged if right of appeal be given, § 101.
 under United States Constitution, § 83.
 right of, how esteemed, § 81.
 guarantee of, in civil cases, § 86.
 when claimed as a matter of right, § 88.
 may be regulated to what extent by legislature, § 106.
 in its present form, found in the Tudor period, § 35.
 dependence of, on moral and civil character of a people, § 40.
 regard for, in early colonies, § 82.
 not guaranteed at first by Constitution in civil cases, § 83.
 in what cases in general denied, § 88.
 as guaranteed in state Constitutions, § 84.
 right in inferior courts, § 99.
 at which stage of proceedings in equity may be asked, § 94.
 right must not be clogged by conditions, § 102.

Justices of the peace — compose coroner's jury in Michigan, § 64.**Justiciars** — beneficial effects of their appointment, § 22.

their acquaintance with Roman law, § 22.

K.

Kenyon — his successful cross-examination on trial of Lord George Gordon, § 223.

Kindred — by affinity and consanguinity, § 174.

degree of, to challenge a juror, § 174.

Knowledge — generally a question of fact, § 284.

L.

- Laugrettomen** — of Norway, a tribunal similar to our jury, § 9.
- Law** — nature of, in early times, § 2.
 whether jury can decide, in Pennsylvania, § 379.
 rule of, meaning, § 257.
 its simple character in early times, § 257.
 right to decide, by jury in New England, § 377.
 as to power of jury to decide, § 373.
 evolved from facts, § 257.
 power and right to decide, confused, § 375.
 right of court to declare, as asserted in trial of Lilburne, § 374.
- Leading questions** — not to be put, § 226.
 may be allowed in cross-examination, § 239.
- Lieber, Francis** — his opinions regarding unanimity, § 78.
- Libel** — power of jury in indictments for, § 382.
 prosecutions for, § 39.
- Lilburne, Colonel** — his trial, § 205.
- Lögman** — duty of, in Norway, § 9.

M.

- Macaulay** — his description of trial of Seven Bishops, § 37.
- Macintosh** — his opinion in reference to Saxon popular assemblies, § 14.
- Magna Charta** — believed to guarantee jury trial, § 24.
 whether jury trial secured by, § 81.
- Majocchi** — his examination on trial of Queen Caroline, § 237.
- Malice** — distinguished as malice in law — malice in fact, § 270.
 express or implied, instructions on, § 331.
 inferred from certain acts, § 270.
 now generally required to be proved, § 331.
- Malicious prosecution** — what constitutes, § 270.
- Mansfield, Lord** — his action in the trial of Woodfall, § 39.
- Memoranda** — may be referred to by a witness, § 229.
 to be referred to by witness only when taken at the time of occurrence,
 § 229.
 use of, on trial of Lord George Gordon, § 230.
- Mental capacity** — of witness to testify, determined by court, § 308.
- Minor offences** — right of jury trial for, does not generally exist, § 95.
- Mirror of Justice** — character of work, § 15, n.
- Misdemeanors** — right of trial by jury for, § 97.
- Misrepresentation of facts** — material a question of fact, § 281.
 in a policy of insurance, § 281.
- Misrepresentation** — of the degree of risk in policy, § 281.
- Mittermaier, Dr.** — his work on trial by jury, § 81, n.

N.

- Nämbd** — comparison of, with jury, § 10.
 in Sweden, description of, § 9.
- Neaves, Lord** — remarks in relation to jury in Scotland, § 79.
- Necessaries** — as a question of law or fact, § 299.
 quality of, a question of law, § 299.
- Negligence** — a question of law when facts are plain, § 296.
 decisions respecting, conflicting, § 294.
 at one time considered a question of fact to a great extent, § 294.
 doctrine of Illinois courts, § 298.
 held a mixed question of law and fact, § 295.
 in crossing a railroad track, § 294.
 in putting arm out of window in train, § 294.
 is a question of law, when there is no dispute about the facts, § 296.
 may often be a question of law, § 296.
 when a question of fact, § 298.
- New England** — manner of selecting jurors in, § 121.
- Nævinger** — of Denmark, description of, § 9.
- Nonsuit** — right to, denied in some States, § 107.
 whether can be allowed compulsorily, § 107.
- Norfolk, Duke of** — denied counsel on his trial, § 205.
- Normans** — introduced the combat or duel, § 22.
- Notice** — actual and constructive, distinction, § 284.
 actual, when directly given, § 284.
 by carrier stipulating against negligence, § 285.
 by means of printed labels, § 285.
 confounded with knowledge, § 284.
 of damage as a question of law or fact, § 282.

O.

- Oath** — to jurors, required to be more strictly administered in criminal cases, § 202.
 solemnity of, among Anglo-Saxons, § 12.
 form of, administered to the jury, § 199.
 of grand jurors in Ohio, § 49.
 of grand jurors in Massachusetts, § 48.
 form of, in a criminal case in New York, § 199.
 of a person accused in Anglo-Saxon law, § 12.
 form of, to jurors who decide law and fact, § 200.
 of jurors, when objection should be made to, § 203.
- Oathworthy** — who was considered as, among Anglo-Saxons, § 12.
- Offence** — grade or character of, in instructions, § 228.
- Officer** — in charge of jury not to converse with, § 391.
 prosecuting, his right to be with the grand jury, § 57.
- Omission** — of duty constitutes negligence, § 272.

- Opening** — by counsel in a criminal case, § 210.
 duty of counsel in, § 209.
 in criminal trials, § 208.
 right to, how valued, § 207.
- Opinions** — as to their source or foundation more regarded as a cause of challenge, 185.
 formed, as a cause of challenge, § 181.
 formed from the relations of witnesses, more often disqualify jurors, § 185.
 if at all formed, disqualify in some places, § 183.
 in reference to parties or subject-matter as a cause of challenge, § 180.
 nature of, to justify challenge, § 181.
 of jurors, various decisions respecting, as a cause of challenge, § 182.
 to disqualify jurors, are required to be fixed, § 186.
 to disqualify jurors, statutory provisions respecting, § 188.
- Ordeal** — different methods of trial by, § 12.
 discouraged by clergy, § 28 n.
 effect of a trial by, § 12.
 trial by, § 12.
- Otho, Bishop of Bayeux** — presided over jury trial in time of William I, § 23.

P.

- Panel** — drawing of, in New York, § 127.
 drawing of, in California, § 128.
 drawing of, in Louisiana, § 128.
 mistakes in names on, effect of, § 130.
 when court may properly discharge jurors from, § 140.
 number formerly required, § 137.
 remarkable unanimity as to drawing of, § 127.
 drawing of, statute requiring to be before court, § 130.
 objection to, when made, § 130.
 returning a greater number not error, § 137.
 drawing of, before what officers, § 127.
 officer drawing to be impartial, § 129.
 excusing or discharging jurors from, § 139.
 mistakes and omissions in drawing, § 130.
- Papers or books** — taken by jurors, § 404.
 taken to jury room, when will not be error, § 405.
- Partial verdict** — § 422.
- Partnership** — a question of law, dependent on facts, § 274.
 erroneous instruction respecting, § 316.
- Payment** — as question of law or fact, § 292.
 by giving promissory note or draft, § 292.
 what may be, in some cases a question of law, § 292.
- Penn and Mead** — trial of, § 37.
- Peremptory challenge** — right of, § 155.
 an old established right, § 155.

Peremptory Challenge — Continued.

- number of, formerly, § 155.
- number changed by various statutes in England, § 156.
- in United States courts, § 157.
- number allowed in various States, § 158.
- by statute 33 Edw. I., § 159.
- now exercised by State, § 161.
- very desirable on State's behalf, § 161.
- right to increase in favor of State, § 162.
- decision in reference to Stokes's case, § 162.
- in civil cases, number, § 163.
- when prisoners jointly indicted, § 164.
- when should be made, § 165.
- must be made before jury are sworn, § 165.
- in civil cases, § 163.
- allowed in favor of the State, § 159.

Perjury — penalty of, in Anglo-Saxon law, § 12.

punished by attain, § 32.

punishment of members of grand assize for, § 25.

Perjury of jurors — prevalence of, statutes against, § 32, n.**Petit larceny — no indictment required for, § 44, n.****Petit jury — definition of, § 76.**

meaning of term, § 76.

reasons why number is twelve, § 77, n.

Petty cases — formerly as now tried without jury, § 99.**Pleadings — what defect in, cured by verdict, § 419.****Plymouth Colony — provides for jury trial, § 82.****Polling jury — a right in a criminal case, § 465.**

denied in Massachusetts, § 465.

not a right in a civil case, § 465.

provisions for in California, § 465.

Polls — challenge to division of, by Coke, § 148.**Possession — when a question of law, § 289.**

where intent is required, a question of fact, § 289.

whether evidence of title, not to be referred to jury, § 289.

Presentment by grand jury — when can be made, § 51.**Presumptions of law — court to instruct on, § 326.****Principal cause — challenge to the array for, § 150.****Prisoner to be present — when verdict announced, § 454.****Probable cause — now generally a question of law, § 271.**

whether a question of law or fact, § 271.

Procedure — in criminal trials before a jury, § 208.**Propter affectum — challenge for, § 177.****Province of court — § 306a.****Q.****Qualifications — of jurors as to political status, § 116.**

various, of jurors stated, § 115.

- Queen Caroline** — cross-examination of witnesses on trial of, § 236.
- Question of law** — erroneous to submit to jury, § 325.
- Questions** — of law and fact must be distinguished, if rules of law are to be uniform, § 256.
- implying opprobrious titles not to be put to witness, § 243.
- of title, as of law or fact, § 306.
- of law or effect, determined on the effect of certain acts, § 272.
- of law and fact, advantage of a distinction between, § 264.
- as to religious or other preferences to jurors, § 197.
- of law, what are, § 261.
- of law and facts, why confounded, § 263.
- put to jurors respecting their opinions, § 196.
- of law and fact, necessity of a distinction between, § 256.
- of law and fact, how distinguished, § 260.
- in cross-examination concise and rapid, § 238.
- of facts, what are, § 262.
- which may be refused answering, § 246.
- Quintilian** — advice to counsel in conducting trial, § 210, n.

R.

- Race** — distinctions of, as regards jurors, abolished, § 116.
- Raleigh** — his abuse by Lord Coke, § 232.
- Ratification** — generally a question of law, § 276.
- Reasonable doubt** — in criminal cases, § 332.
- proper application of term, § 333.
- whether properly used in civil cases, § 335.
- erroneous application of term, § 334.
- Reasonable time** — a mixed question of law and fact, § 286.
- when a question of law, § 287.
- when a question of fact, § 288.
- Recollection** — questions as to, in cross-examination, § 237.
- Reform schools** — right of jury trial for committals to, § 108.
- their extension and importance, § 109.
- Reply, right to** — generally given to a party opening, § 221.
- when not granted, § 221.
- Repp** — a Danish jurist, maintains jury trial existed in Scandinavia, § 9, n.
- Requests to charge** — right of a party to make, § 337.
- when may be denied, § 337.
- must be embodied in plain language, § 338.
- modification of, § 339.
- modifying previous instructions, § 339.
- need not be given as asked, § 339.
- denied, when substance previously given, § 340.
- ought sometimes to be given, though, § 340.
- Right to begin** — where wills are contested, § 218.
- Riot** — verdict in cases of, § 434.
- Risk** — as to, in policy of insurance, § 283.

Roman law — pleading in, effect of, § 7.
 method of trial in, § 7.
 discriminated between questions of law and fact, § 7.
 principle of trial by jury existed in, § 8.

. S.

Sale — if assent is required to be found — question of fact, § 290.
 to constitute assent of parties required, § 290.
 what constitutes a question of law, § 290.

Sales — by means of letter or telegram, § 290.

Sancroft — a singular allusion to jury trial in life of, § 37, n.

Scandinavian tribunals — in ancient times had a popular character, § 9.
 very analogous to trials by jury, § 9.

Sealed verdict — in what cases rendered, § 449.
 jury to be present when rendered, § 449.
 to be kept secret until given in court, § 449.
 when returned, § 450.
 when jury make and separate under authority of court, § 450.
 if required, not to be given orally, § 450.
 not allowed in cases of felony, § 451.
 in criminal cases when allowed by statute, § 451.

Seduction — instructions of court respecting, § 314.

Selection of jurors — in New York, § 122.
 various modes of, in States, §§ 122, 123.

Selection of jury — informal mistakes and omissions, § 125.

Separation of jury — in capital cases not permitted, § 395.
 when fatal to verdict, § 396.
 how far permitted, § 394.

Shaftesbury, Earl of — action of grand jury in reference to, § 42, n.
 oath of grand jury in his case, § 48.

Sheriff's jury — its nature and powers, § 69.
 number composing, § 69.
 assess damages in taking land, § 69.
 how selected, § 70.

Sleeping of jurors — on trial, § 387.

Social — or business relations as a cause of challenge, § 177.

Special findings — control general verdict, § 439.

Special jury — history of, § 71.
 in some places at discretion of court, § 72.
 special provisions for in certain States, § 72.
 occasions when ordered, § 72.
 mistakes and omissions of names in, § 74.
 mode of striking in New York, § 73.
 may be had in a criminal case, § 72.
 selection and formation of, § 72.
 deficiency in, supplied by *tales*, § 73.
 qualification of members of, § 73.

Special verdict — definition of, § 435.

in case of insanity, § 435.

must find all essential facts, § 436.

can be found by jury generally, § 436.

not finding facts, presumed not to exist, § 436.

instances of defect in, § 437.

court can only presume what is found in, § 437.

facts cannot be supplied to aid, § 437.

must not give evidence of facts merely, § 438.

effect of, on general, § 439.

power of court to alter or amend, § 440.

where jury make wrong inference, § 440.

not frequent in criminal cases, § 441.

in a criminal case, § 442.

in Pennsylvania, § 441.

instances of defect in, § 442.

Star Chamber — authority of, abolished with downfall of Stuarts, § 39.

punishment of juries before, § 38.

Starkie — his opinion as to existence of jury trial among Anglo-Saxons,

§ 11, n.

St. Asaph, Dean of — trial of, § 249.**Statute** — De officio Coronatoris, § 62.**Statute of Northampton** — provision by, for jury trial, § 26.**Statutory crimes** — whether can be tried without jury, § 98.**Struck jury** — See SPECIAL JURY.**Summoning jury** — mode changed in England, § 181.

how accomplished in England, § 181.

must be by proper officer, § 135.

when not done by proper officer, § 184.

technical pleas in relation to, not favored, § 135.

Sunday — validity of verdict rendered on, § 455.**Supervisors** — select jury lists in some States, § 122.**Surplusage in verdict** — how regarded, § 413.**Swearing the jury** — form of oath, § 199.

T.

Tales — in case of deficiency in special jury, § 73.**Talesmen** — first mentioned in 35 Hen. VIII., c. 6, § 141.

number, in general, in discretion of court, § 143.

subject to challenge, § 144.

may be summoned when regular panel engaged, § 142.

number summoned, § 143.

when may be summoned, § 141.

summoning of, not now favored, § 142.

to have same qualifications as regular jurors, § 144.

summoned to supply a defect of jurors, § 142.

Throckmorton, Sir Nicholas — description of trial of, § 36.

Title — as a question of law or fact, § 306.

Tribunals — in early times, were a part of the general assembly, § 4.

Triors — form of oath administered to, § 192.

their appointment and duties, § 192.

how they act in deciding a challenge, § 193.

U.

Unanimity of petit jury — reasons for, § 79.

reasons against, § 79.

Usury — whether a question of law or fact, § 293.

V.

Vaughan, Chief Justice — disapproves of punishment of juries, § 38.

Venire facias distringas — when issued, § 131.

Venire — to summon grand jury not void for want of a court from which issued, § 46.

qualifications of jurors to be stated in, § 132.

to summon jury, § 132.

irregularity in issue, to be objected to, when, § 133.

to have the seal of the court from which issued, § 132.

not always necessary to summon a jury, § 132.

not necessary to issue in certain cases in New York, § 132.

mistakes and omissions in, § 133.

names of jurors usually inserted in, § 133.

time to issue before opening of court, § 133.

usually directed to the sheriff, § 134.

is directed to coroner when sheriff incapable, § 134.

usually directed to a constable in New England, § 134.

return of, sheriff omitting to sign, § 136.

return of, into court, § 136.

defective returns of, § 136.

special, when may issue, § 138.

special provisions for, in Illinois and Michigan, § 138.

special, not to issue if any jurors appear, § 138.

special provision for, in New York, § 138.

Verdict — right of court to direct, questioned, § 351.

right of court to direct, upheld, § 351.

in what instances, may be directed, § 352.

court bound to direct a, on some occasions, § 352.

directing, in criminal case proper, § 353.

should not be directed, if evidence circumstantial, § 355.

proper test as to propriety of directing, § 354.

may be directed under a hypothesis, § 356.

directing, when erroneous, § 355.

directing, in cases of contributory negligence, § 357.

privy, what is, § 412, n.

Verdict — Continued.

- improper to determine, by chance, § 406.
- several kinds of, § 412.
- meaning of term, § 411.
- advice of Coke to jury how to find, § 412, n.
- jury empowered to give special, when, § 412, n.
- general more common in criminal cases, § 413.
- surplusage in, rejected, § 413.
- general signification of, § 413.
- costs not to be added to, § 413.
- must be certain, § 414.
- finding "principal, interests, and costs," § 414.
- how far court may mould, § 414.
- figures in, preceded by \$ sufficient, § 415.
- assessment of damages in, § 415.
- not to find interest in, § 415.
- must be for a determinate amount, § 415.
- finding "full amount claimed," § 416.
- not defective from which amount can be ascertained, § 416.
- not to find more than demanded, § 417.
- for less grade than charged, § 430.
- in some places to express degree of crime, § 431, n.
- wherein may be defective, § 443.
- more usually amended in England, § 458.
- must find all alleged in indictment, § 448.
- deficiency of in action of trespass, § 444.
- must strictly find the issue, § 444.
- finding one of two issues, § 444.
- "guilty of perjury," when defective, § 446.
- varying from the issue bad, § 446.
- under control of jury until given in court, § 456.
- varying from indictment bad, § 448.
- reception of, must be in open court, § 452.
- amended by court in matters of form, § 464.
- reception of, in England in criminal cases, § 452.
- on a matter not in issue, § 445.
- court cannot alter, § 456.
- amendment of, not generally in criminal cases, § 458.
- sealed, amending by order of court, § 460.
- must only be amended in presence of jury, § 461.
- set aside when jury disregard evidence, § 470.
- in detainee, defective instance of, § 446.
- informal, may be amended, § 457.
- in actions of ejectment, § 447.
- reception of jury to be questioned as to, § 452.
- rendered on a Sunday, § 455.
- expression of language of, altered, § 457.
- when may be amended in criminal case, § 459.

Verdict — *Continued.*

- may be amended, when, § 461.
- how and when court can amend, § 463.
- amount not being stated, jury sent back, § 457.
- sufficiency of, § 443.
- method of obtaining in modern times, § 476.
- jury not to provide mode of payment in, § 445.
- conclusiveness of, § 466.
- conclusive as to parties of record, § 468.
- set aside when no evidence to sustain, § 471.
- before actually filed juror may dissent from, § 462.
- set aside when jury render against instructions, § 470.
- not set aside in case of conflicting evidence, § 473.
- conclusive in case of acquittal, § 467.
- not to be rendered out of court in criminal cases, § 454.
- in criminal case, right of people to appeal from, § 467, n.
- when may be properly set aside, § 469.
- set aside when clearly against evidence, § 472.
- harsh treatment to obtain, § 475.
- set aside when manifestly against law, § 474.

Vicinage — jury required to come from, § 80.

View — in what cases given to jury in California, § 370.

jury to have, of premises, § 370.

Voir dire — examination of juror on, § 166.

importance of examination on, § 166.

W.

Wager of battel — how introduced in English law, § 22.

abolition of, in English law, § 22, n.

Waiver — in civil cases of jury trial, § 111.

of jury trial under Virginia statute, § 113.

of jury trial regulated by statute, § 112.

of jury trial in criminal cases, § 113.

of trial by jury, § 110.

of jury trial not allowed in certain criminal cases, § 113.

of challenge, when and how, § 198.

under a policy of insurance, § 282.

Warranty — representation in policy construed as a, § 281.

Wergild — nature of, among Anglo-Saxons, § 13.

Whately, Archbishop — his opinion of cross-examination, § 233.

Wills — when contested, who has right to begin, § 218.

Wiseman, Cardinal — action for libel against, § 244.

Witness — not generally bound to answer questions tending to his disgrace, § 241a.

not to be asked questions involving an admission of crime, § 244.

Witnesses — when cannot be impeached, § 231.

credibility of, court not to instruct on, § 361.

Witnesses — Continued.

- examination of, before jury, importance of, § 223.
- when testimony of, may be rejected by jury, § 363.
- credibility of, for the jury, § 361.
- before grand jury, swearing of, § 55.
- credibility of, how jury may estimate, § 362, n.
- proper way to begin examination of, § 225.
- in cross-examination, how questioned, § 234.
- cannot state a conclusion from facts, § 228.
- credibility of, when court may instruct, § 362.
- before grand jury, § 55.
- may refer to memoranda, § 229.
- coroner to bind over to appear, § 67.
- credibility of, general rule as to, § 363.
- counsel's demeanor in respect to, § 225.
- before grand jury, statutory requirements respecting, § 55, n.
- in certain cases excused, answering on the ground of privilege, § 246.
- in examination of, to use words of plain meaning, § 225.
- before coroner's jury, not entitled to fees, § 67.
- not to be asked for opinion or belief, § 228.
- before grand jury in Connecticut, § 55.
- bad reputation of, credit of testimony, § 364.
- before grand jury to be indorsed on indictment, § 55.

Witleford — proceedings held at, in a claim to land in Saxon times, § 19.

Woodfall — prosecution of, for libel, § 39.

Written instruments — in evidence, weight of, for jury, § 302.

- as a question of law, § 300.
- when may be referred to jury, § 300.
- oral testimony to explain, § 301.
- when of doubtful meaning, § 301.
- construction of, § 300.

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